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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928.9

No. 475 9

HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY, PETITIONER,

vs.

A. B. LEACH & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1928

CERTIORARI GRANTED OCTOBER 29, 1928

(33,788)

(33,788)

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vs.

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CAPTION.

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION, SS.

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said Court begun and held at the City of Cleveland, in said District, on the first Tuesday in February, being the 2d day of said month, in the year of our Lord One Thousand Nine Hundred and Twenty-six, and of the Independence of the United States of America, the One Hundred and Fiftieth, towit: on Thursday, the 18th day of March, A. D. 1926.

Present: HONORABLE D. C. WESTENHAVER,
United States District Judge.

HUGH W. GRANT, Receiver of
THE STRUTHERS FURNACE COMPANY,
vs.
A. B. LEACH & COMPANY, INC.
No. 1606.

Said action was commenced on the 5th day of August, A. D. 1925, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the Court were made and entered in the order and on the dates hereinafter stated, to wit:

PETITION.

(Filed Aug. 5, 1925.)

Now comes the plaintiff, Hugh W. Grant, and avers that he is the duly appointed and qualified receiver of all of the property, goods, assets, choses in action, and of all other kind and character of property of The Struthers Furnace Company, duly appointed by the Common Pleas Court of Mahoning County in the case of The Guardian Savings and Trust Company, Trustee, Cleveland, Ohio, vs. The Struthers Furnace Company, being case No. 56103 in the said court, and that he was appointed and duly qualified on the 20th day of January, 1925, and that he is a citizen and resident of the State of Ohio;

Avers that the defendant, A. B. Leach and Co. Inc. is a corporation duly incorporated and organized under the laws of the State of New York, and is a citizen of said State, authorized to do business in the State of Ohio, in the Northern District thereof with offices and general managers upon whom service of summons can be had in this jurisdiction, that it is now, and was at all other times hereinafter mentioned, engaged in the business of buying and selling stocks and bonds and other corporate securities; that the amount in controversy in this action exceeds three thousand ($3000.00) dollars; that this action is brought by this Receiver by virtue of authority so to do granted to him by the Court so appointing him as Receiver.

This plaintiff for his cause of action against the said defendant, avers:

That on the 15th day of December, 1919, The Struthers Furnace Company, pursuant to the authorization of its stockholders and directors by action duly taken, increased the capital stock of said corporation from one million ($1,000,000.00) dollars to two million two hundred fifty thousand ($2,250,000.00) dollars by the addition of one million two hundred fifty thousand ($1,250,000.00) dollars of seven percent cumulative preferred stock; that in said Resolutions authorizing the increase of said capital stock and the issuing of said preferred stock it was provided among other things that it should be redeemed by the Company only out of the net surplus profits of the profits of the Company at any quarter annual dividend payment, and only out of a

redemption fund set aside out of said net surplus profits each year for that particular purpose and that the stock so to be redeemed and retired was to be determined by lot, that is, the particular shares to be redeemed at such period and out of such redemption fund was to be determined impartially and by lot in the manner provided for in said Resolutions relating to the increase of said capital stock and the increase of said preferred stock.

It was further provided in said Resolutions that no mortgage or other liens should be placed upon the real estate, plant or equipment of the Company or any part thereof except by the vote or assent in writing of the holders of three fourths in amount of the preferred stock so issued.

The plaintiff avers that prior thereto, to-wit on the 29th day of November, 1919, said The Struthers Furnace Company anticipating the issuing of said preferred stock entered into a contract with A. B. Leach and Company, Inc. under the laws of the State of New York to purchase all of said preferred stock when issued under said Resolutions and subject to said conditions as to redemption and other conditions herein before set forth and as contained in said resolutions, at a certain percentage of the par value thereof and that the said A. B. Leach and Co. Inc. well knew all of the conditions as to the redemption of said stock and the fund out of which alone the stock could be redeemed and of the necessity of three fourths in amount of holding of said stock to consent to the subsequent making of any mortgage on the company's property.

Plaintiff further says that it is informed and believes and so avers the fact to be that the said A. B. Leach and Company Inc. purchased all of said preferred stock so issued.

Plaintiff avers that thereafter to-wit on the 5th day of May, 1922, for the declared purpose of borrowing money for the general corporate uses and purposes of The Struthers Furnace Company at meetings duly and regularly held upon proper notice authorized the making and execution to The Guardian Savings and Trust Company as Trustee of the corporation mortgage and bonds which are the subject matter of this action. That at said time the defendant was the owner of at least three thousand shares of the preferred stock of this corporation and voted at the stockholders' meeting authorizing

said bond issue and the execution of the mortgage, three thousand shares of said preferred stock and that said three thousand shares, so voted and assenting to the making of said bonds and mortgage, was necessary in order to make up the seventy five percent of the outstanding preferred stock requisite to the making of the mortgage by said corporation.

Plaintiff avers that pursuant to the authorization of the Board of Directors and of the stockholders of The Struthers Furnace Company so procured thru the cooperation of A. B. Leach and Co. Inc. as aforesaid The Struthers Furnace Company on or about the 18th day of May, 1922, made, executed and delivered to The Guardian Savings and Trust Company, Trustee, of Cleveland, Ohio, its first mortgage bonds on all of the real estate of said corporation, its plant, equipment, apparatus, implements and appliances.

This plaintiff avers that prior thereto, to-wit, on the 15th day of April, 1922, The Struthers Furnace Company and A. B. Leach and Co. Inc. anticipating said mortgage and bond issue entered into a written contract for a valuable consideration by the terms of which the said A. B. Leach and Co. Inc. was given the right, privilege and option of purchasing all of said bond issue so to be secured by said mortgage by the payment in cash at ninety percent of eight hundred thousand ($800,000.00) dollars of the par value of said bonds and of the four hundred fifty thousand ($450,000.00) dollars of the par value of said bonds upon the following terms, to-wit:—

> "For Every Fifteen Hundred ($1500.00) Dollars of the Par Value of Bonds at the Price of Ninety and One-Half Percent (90½%) and Accrued Interest There Shall be Paid Ten Shares of the Furnace Company's Preferred Stock at Eighty Five ($85.00) Dollars Per Share and Accrued Dividend. The Balance to be Paid in Cash."

The remainder of said issue of bonds, namely, two hundred fifty thousand ($250,000.00) dollars par value may be taken and paid for at the election of A. B. Leach and Co. Inc. at the price of ninety ($90.00) dollars and accrued interest in cash upon delivery. Said contract further provided that said A. B. Leach and Co. Inc. in the event that they exercise the option aforesaid to take

and pay for the said bonds from time to time either in cash, or cash and stock in the amounts as and when called for within one hundred twenty five days from the date of the exercise of said option by it.

The plaintiff avers that said The A. B. Leach and Co. Inc. well knowing as aforesaid that The Struthers Furnace Company was without authority of law to issue bonds in redemption of or in payment of its preferred stock or any part thereof and well knowing that its preferred stock could only be redeemed and retired at specified time when chosen by lot and then only out of a redemption fund accumulated from net surplus profits, voted as aforesaid the three thousand shares of the preferred stock at the Directors' Meeting authorizing said mortgage, well knowing that without said three thousand shares the required seventy five percent of the preferred stock could not be obtained.

The plaintiff avers that said A. B. Leach and Co. Inc. entered into its said contract of April 15th, 1922, providing for the exchange of its preferred stock for the first mortgage gold bonds of this Company, thereafter to be issued, well knowing the invalidity of said contract and well knowing and believing that the preferred stock it then held was of doubtful value, and fraudulently conspired with W. C. Runyon, president or vice president of The Struthers Furnace Company, who then held or controlled a majority of the stock of the said Company or controlled those holding a majority of the stock of said Company, to enter into said bond purchasing option or contract, and wrongfully and fraudulently conspired with said Runyon to enable the said A. B. Leach and Co. Inc. to acquire said bonds for its stock, to vote at the stockholders' meeting of May 5th its three thousand shares of preferred stock in order to make up the necessary seventy five percent of the preferred stockholders requisite to the authorization of said bonds and mortgage, well knowing that by said fraudulent and wrongful action and conspiracy it was depriving The Struthers Furnace Company of the right to sell its bonds for the purpose of raising needed money to carry on and prosecute the general corporate business of said Company.

The plaintiff avers that thereafter the said A. B. Leach and Co. Inc. exercised its option to take at least four hundred fifty thousand ($450,000.00) dollars of the

bonds of this Company so issued at ninety and one half percent (90½%) of their face value, the additional one half percent (½%) being subsequently agreed upon, and for each fifteen hundred ($1500.00) dollars of bonds so purchased at ninety and one half (90½%) percent to deliver up and exchange with The Struthers Furnace Company ten shares of the preferred stock so held by it at eighty five ($85.00) dollars per share and paid the balance of each fifteen hundred ($1500.00) dollar allotment in cash; that The Guardian Savings and Trust Company, Trustee, upon the order of A. B. Leach and Co. Inc. delivered to it the four hundred fifty thousand ($450,000.00) dollars par value of the bonds of such company and received in payment therefor pursuant to said illegal contract three thousand shares of the preferred stock so held by Leach and Company upon the terms contained in said contract, and the transfer agent of said corporation assumed to issue a certificate for three thousand shares of the preferred capital stock of said corporation so exchanged for bonds for Leach and Company Inc., said certificate being issued in the name of W. C. Runyon, Trustee of The Struthers Furnace Company and the balance in cash, well knowing that as such Trustee, which fact was also well known to the said A. B. Leach and Co. Inc. that with or without the consent of The Struthers Furnace Company it was without authority of law to exchange the preferred stock of said Company for bonds of said Company, and that the said stock was not attempted to be redeemed by said Company out of any redemption fund accumulated for that purpose out of the net surplus profits, well knowing that said stock had not been selected by lot for redemption or retirement; and received only such money therefor from the said A. B. Leach and Co. Inc. for every fifteen hundred ($1500.00) dollars worth of the face value of said bonds as the difference between ten shares of preferred stock at eighty five ($85.00) dollars per share and fifteen one hundred dollar bonds at ninety and one half (90½) per share, to-wit, received only the sum of five hundred fifteen ($515.00) dollars in cash for every fifteen hundred ($1500.00) dollars allotment of bonds and received as a balance of said sale ten shares of the preferred stock of this Company, and thereupon turned over to The Struthers Furnace Company three thousand shares of its preferred stock as aforesaid, and paid the balance in cash, well knowing

that as aforesaid The Struthers Furnace Company was without authority of law to redeem or retire said preferred stock by the issuing of bonds in payment therefor and was without authority to redeem those particular bonds held by said A. B. Leach and Co. Inc. in any event, and well knowing that said stock was not being redeemed or retired by said Company out of any redemption fund accumulated out of the net surplus profits of this Company.

This plaintiff is unable to state the serial numbers of the bonds of this Company so unlawfully delivered by the Trustee to A. B. Leach and Co. Inc. but the said A. B. Leach and Co. Inc. has full knowledge of the serial numbers, denominations and identity of the particular bonds so delivered in exchange for said preferred stock.

This plaintiff avers that he has tendered back to said A. B. Leach and Co. Inc. the preferred stock witnessed by stock certificate made out in the name of W. C. Runyon, Trustee, duly endorsed to The Struthers Furnace Company and in turn endorsed to A. B. Leach and Co. Inc. and demanded the return of the bonds, which the said A. B. Leach and Co. Inc. has refused, and has made good its tender by depositing said stock certificate in the custody of the Clerk of this Court to be delivered to said A. B. Leach and Co. Inc. on return of said bonds.

Plaintiff prays therefore that the Court will order the said defendant to surrender and deliver to this Trustee those certain bonds, which to its knowledge were exchanged by it for the preferred stock of this Company so held by it, or in the event that it shall transpire that defendant has sold or disposed of said bonds, or any part thereof since acquiring the same, then this plaintiff prays in the alternative that the said defendant be ordered and adjudged to account to this plaintiff, the receiver of The Struthers Furnace Company, and pay him for the full amount of the estimated cash value of all bonds so received in exchange for its preferred stock measured by the estimated value of the preferred stock so exchanged by it in excess for said bonds and that a full and accurate accounting may be had between this Trustee and the defendant, A. B. Leach and Co. Inc. for all of said bonds, if any, sold and disposed of by said A. B. Leach and Co. Inc. and which it is not in a position to redeliver to this plaintiff and that the Court upon the surrender by this plaintiff of all of

the preferred stock of this corporation so delivered by the said A. B. Leach and Co. Inc. will order, adjudge and decree against said A. B. Leach and Co. Inc. on this accounting that it pay to this Receiver the amount found due as prayed for herein. Plaintiff further prays for such other and further relief as to the Court may seem just and equitable.

WILSON, HAHN, HENDERSON & WILSON,

Attorneys for Plaintiff.

STATE OF OHIO,
MAHONING COUNTY, ss.

HUGH W. GRANT, being first duly sworn, says that he is the Receiver of The Struthers Furnace Company, defendant herein; that the facts stated and allegations contained in the foregoing petition are true as he verily believes.

HUGH W. GRANT.

Sworn to before me and subscribed in my presence this 30th day of July, 1925.

A. M. HENDERSON,

(Seal) *Notary Public.*

Praecipe.

TO THE CLERK:

Please issue summons to the within named defendant, A. B. Leach and Co. Inc. and make same returnable according to law. Endorse thereon "Return of bonds, accounting and equitable relief demanded."

WILSON, HAHN, HENDERSON & WILSON,
A. M. HENDERSON and F. R. HAHN,

Attorneys for Plaintiff.

ANSWER OF A. B. LEACH & CO., INC., DEFENDANT, TO THE PETITION OF HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY, PLAINTIFF.

(Filed Sept. 25, 1925.)

Now comes A. B. Leach & Co., Inc., a corporation, defendant, and for answer to the petition of Hugh W. Grant, Receiver of The Struthers Furnace Company, plaintiff, heretofore filed herein, says:

1. This defendant admits the allegations in the first paragraph of said petition contained.

2. This defendant admits the allegations in the second paragraph of said petition contained, save and except the allegation therein made this action is brought by said Receiver by virtue of authority so to do granted to him by the court of his appointment; that this defendant has no knowledge or information as to the authority granted to said Receiver to bring said action and therefore neither admits nor denies said allegations of the petition but requires said plaintiff to make strict proof thereof.

3. This defendant admits that on or about the 15th day of December, 1919, The Struthers Furnace Company, pursuant to the authorization of its stockholders and directors by action duly taken, increased the capital stock of said corporation from $1,000,000 to $2,250,000 par value, by the addition of $1,250,000 of 7% cumulative preferred stock, but this defendant denies that in the resolutions authorizing said increase of said capital stock and the issuing of said preferred stock it was provided, among other things, that said preferred stock should be redeemed by the said The Struthers Furnace Company only out of the net surplus profits of the company at any quarter-annual dividend payment and only out of a redemption fund set aside out of said net surplus profits each year for that particular purpose, but avers the facts to be that it was and is provided in the resolutions authorizing the issuance of said preferred stock and in the certificates evidencing said stock that "the whole or any part of the preferred stock may be called for redemption at any time by the Company upon not less than thirty days' prior notice at $105 per share plus all unpaid, accrued and accumulated dividends thereon; that the Company shall, during the year

beginning January 1, 1922, and during each year beginning January 1 thereafter, set aside out of surplus profits and apply to the redemption and retirement of preferred stock on or before March 1 of each year, beginning March 1, 1922, an amount in each year of the first five year period beginning January 1, 1922, of not less than ten per cent., for each year of the second five year period beginning January 1, 1927, not less than fifteen per cent., and for each year thereafter, beginning January 1, 1932, not less than twenty per cent. of the net surplus profits of the Company, for the preceding year remaining after the payment of preferred dividends and all taxes, including any state and federal income or excess profits tax, such redemption and retirement to be (1) by purchase in the market at not exceeding the redemption price, or (2) by calls for redemption''; that it is not provided in and by said resolutions or by said certificates evidencing said preferred stock that said The Struthers Furnace Company should redeem said preferred stock only out of net surplus profits of the company and only out of a redemption fund set aside out of said surplus profits for that particular purpose, nor is it provided in and by said resolutions that the method of redemption therein referred to shall be the only or exclusive method of redeeming or retiring said preferred stock.

4. That it is provided in and by said resolutions that no mortgage or other lien other than a purchase money mortgage shall be placed upon the real estate, plant or equipment of the company, except with the affirmative vote or consent in writing of the holders of three-quarters in amount of the preferred stock of said issue then outstanding.

5. That on the 29th day of November, 1919 The Struthers Furnace Company entered into a contract with A. B. Leach & Co., Inc. by the terms of which A. B. Leach & Co., Inc. undertook to purchase from said The Struthers Furnace Company said issue of $1,250,000 cumulative preferred stock of The Struthers Furnace Company, subject, however, to certain terms and conditions in said agreement set forth; that said contract does not refer to or make a part thereof the terms or conditions to be set forth in said resolutions of the stockholders and/or directors of said company; and this defendant denies that said A. B. Leach & Co., Inc. knew

all of the conditions as to the redemption of said stock or that said stock could be redeemed only out of the net surplus profits of the company, but admits that said A. B. Leach & Co., Inc. was, after the making of the same, familiar with the resolutions adopted by the stockholders and directors of said The Struthers Furnace Company and the terms and provisions of said preferred stock certificates.

6. This defendant admits that said A. B. Leach & Co., Inc. and its associates purchased all of said preferred capital stock of said The Struthers Furnace Company.

7. This defendant admits that on the 5th day of March, 1922, at meetings of the stockholders and directors of The Struthers Furnace Company duly and regularly held upon proper notice, The Struthers Furnace Company authorized the making and execution to The Guardian Savings and Trust Company as Trustee of a corporate mortgage securing an issue of $1,500,000 First Mortgage Sinking Fund 8% Gold Bonds of The Struthers Furnace Company, and admits that on the 5th day of May, 1922 this defendant was the owner of 3,000 shares of the preferred capital stock of the said corporation and that prior to said meetings on the 5th day of May, 1922 this defendant executed and delivered to the secretary of said company a written consent and proxy by the terms of which this defendant appointed W. C. Runyon, W. C. Runyon, Jr., and George A. Coulton, or any one or more of them, as attorney and proxy in its place and stead to appear and to vote, consent and act in respect to all stock of said company standing in the name of A. B. Leach & Co., Inc. at a special meeting of its stockholders on the 5th day of May, 1922, and further consenting and agreeing that said company, by and through its officers and directors, might authorize, issue and dispose of an issue of bonds of the company, not to exceed $1,500,000, and secure the payment of the principal and interest of said bonds by a mortgage on the real estate, plant and equipment of the company, but this defendant is not advised as to whether or not, at said meeting of the stockholders, the said 3,000 shares then held and owned by this defendant were voted by the proxies or any of them named in said written consent and proxy in favor of the issuing of said bonds and the issuing of said mortgage, or whether said 3,000 shares were neces-

sary in order to make up 75% of the outstanding preferred stock requisite to the making of said mortgage, but this defendant avers that stockholders owning and holding more than three-fourths of the preferred capital stock of The Struthers Furnace Company executed and delivered to the secretary of the company said consents and proxies prior to the holding of said meeting on the 5th day of May, 1922.

8. This defendant admits that The Struthers Furnace Company, on or about the 18th day of May, 1922, made, executed and delivered to The Guardian Savings Bank and Trust Company, Trustee, of Cleveland, Ohio, its first mortgage on the real estate, plant and equipment of The Struthers Furnace Company securing said issue of $1,500,000 first mortgage bonds, but this defendant denies that the authorization of the Board of Directors and of the stockholders of The Struthers Furnace Company was procured through the co-operation of this defendant, save and except as this defendant, as a holder of preferred stock, assented thereto by the execution and delivery of said consent and proxy.

9. This defendant admits that on the 15th day of April, 1922 this defendant entered into a contract with The Struthers Furnace Company, in letters and figures as follows, to-wit:—

> "Agreement made this 15th day of April, 1922, between The Struthers Furnace Company, an Ohio corporation, hereinafter called the 'Furnace Company,' party of the first part, and A. B. Leach & Co., Inc., a New York corporation, hereinafter called 'Leach Company,' party of the second part.
>
> "Whereas, the Furnace Company intends to provide for an issue of One Million Five Hundred Thousand Dollars ($1,500,000) principal amount of First Mortgage and Collateral Trust 8% Sinking Fund Gold Bonds to be secured by a First Mortgage and Collateral Trust Indenture, both more particularly described in Exhibit 'A,' hereto annexed, and made a part hereof; and
>
> "Whereas, Furnace Company desires to make arrangements for the sale of said bonds, and for that purpose to give unto the Leach Company the right, privilege and option of buying said bonds or any part thereof and of forming a Syndicate to dispose of the same; and

"Whereas, Leach Company desires the right, at its election, to buy said bonds or a part thereof and form a syndicate to dispose of the same;

"Now, therefore, in consideration of the premises the sum of One Dollar ($1.00) paid by Leach Company to Furnace Company, and other valuable considerations, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the parties hereto agree as follows:

"1. The Furnace Company agrees to and hereby does give and grant unto Leach Company the right, privilege and option to purchase the whole or any part of the said issue of bonds at the price of 90 and accrued interest, and to form a syndicate to dispose of the same on such terms and conditions as Leach Company shall fix and determine.

"2. The Furnace Company agrees that in the event Leach Company shall exercise its right to purchase any of said bonds and to form a syndicate to dispose thereof, that it will sell and deliver the same to Leach Company at the price of 90 and accrued interest.

"3. The Furnace Company further agrees in the event that the Leach Company shall exercise its option to purchase any of said bonds and form a syndicate to sell the same, that the Leach Company shall pay for the first Eight Hundred Thousand Dollars ($800,000) par value of said bonds or any part, at the price of 90 and accrued interest in cash upon delivery. In the event that further of said bonds are taken, Leach Company shall have the right to take and pay for any part of Four Hundred and Fifty Thousand Dollars ($450,000), par value thereof, on the following basis:

> For every $1,500 par value of bonds at the price of 90 per cent and accrued interest, there shall be paid ten shares of the Furnace Company's preferred stock at $85 per share and accrued dividend, the balance to be paid in cash.

"The remainder of said bonds, viz., Two Hundred and Fifty Thousand Dollars ($250,000), par value may be taken and paid for at the election of Leach Company at the price of 90 and accrued interest.

"4. The Furnace Company agrees to furnish to Leach Company at once certified copies of earning statements approximately substantiating the figures given in Exhibit 'A' hereto annexed for the years 1917 to 1921, both inclusive, also appraisals of the properties of the party of the first part, properly sworn to, substantiating the figures given in said Exhibit 'A.'

"5. The Furnace Company agrees to submit to its stockholders and directors in due and proper form the matter of the authorization and issue of said bonds and the giving of said mortgage to secure the same, and upon the approval thereof by said stockholders and directors to deliver to Leach Company certified copies of resolutions of its stockholders and directors authorizing said issue of bonds and the execution of the Indenture securing the same, together with a certified copy of the consent of the stockholders in respect thereto, and the opinion of its counsel as to the validity of said issue of bonds and the Indenture securing the same, and that all legal requirements have been complied with.

"6. It is mutually understood and agreed between the parties hereto that if at the time of the issuance of said bonds, bonds of the same class bearing a lower rate of interest may be sold, the interest provided to be paid on said bonds may be less than eight per cent (8%), the rate of interest, however, to be left entirely to the discretion of Leach Company which shall have the right to fix the same.

"7. It is mutually understood and agreed between the parties hereto that the option hereby granted unto Leach Company shall run for a period of two (2) weeks from the date of the receipt by it of the data and all papers hereinabove referred to and agreed to be so furnished by the Furnace Company.

"8. Leach Company agrees, upon receipt of the papers aforesaid, to put forth its earnest efforts in an endeavor to form a syndicate to dispose of said bonds.

"9. Leach Company agrees, in the event that it exercise the option aforesaid, to take and pay for the said bonds from time to time, either in cash and/or cash and stock, as provided in paragraphs

2 and 3 hereof, in the amounts as and when called for, within one hundred and twenty-five (125) days from the date of the exercise of said option by it.

"10. This contract is subject to the ratification and approval of the authorization and issue of said bonds and mortgage by the stockholders and directors of the Furnace Company.

"IN WITNESS WHEREOF, the Furnace Company has hereunto caused this agreement to be signed in its name by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed, attested by its secretary, by order of its Board of Directors, and Leach Company has hereunto caused the same to be signed in its name by one of its vice-presidents as of the day and year first above written.

THE STRUTHERS FURNACE COMPANY,

(Seal) By .....

Attest:

.....

Secretary.

A. B. LEACH & CO., INC.,

(Seal) By .....

Vice-President.

Attest:

.....

Secretary."

10. This defendant denies that A. B. Leach & Co., Inc. well knew that The Struthers Furnace Company was without authority of law to issue bonds in redemption of or in payment of its preferred stock or any part thereof, and denies that said The Struthers Furnace Company was without authority of law to issue bonds in redemption of or in payment of its preferred stock or to purchase its preferred stock and pay therefor with bonds, and denies that this defendant well knew that said preferred stock could only be redeemed and returned at specified times when chosen by lot and then only out of a redemption fund accumulated from net surplus profits and denies that said preferred stock could only be so redeemed and returned, and denies that this defendant voted the said 3,000 shares of the pre-

ferred stock at the directors' meeting authorizing said first mortgage, and denies that this defendant well knew that without said 3,000 shares the required 75% of the preferred stock could not be obtained.

11. This defendant denies that A. B. Leach & Co., Inc. entered into said contract of April 15, 1922, well knowing the invalidity of said contract and well knowing and believing that the preferred stock it then held was of doubtful value, but avers the fact to be that this defendant was advised by counsel learned in the law, prior to the making and execution of said contract of April 15, 1922, that the exchange of said preferred stock for said first mortgage bonds was lawful and valid, and is now advised by counsel, and on such information and belief states the fact to be, that said exchange was and is valid; and this defendant denies that it ever fraudulently conspired with W. C. Runyon, President or Vice President of The Struthers Furnace Company, to enter into said contract of April 15, 1922, or that this defendant conspired with any other person or persons, as alleged in said petition, and denies that this defendant fraudulently and wrongfully conspired with said Runyon so as to enable this defendant to acquire said bonds for its stock, to vote at said stockholders' meeting of May 5, 1922, its said 3,000 shares of preferred stock in order to make up the requisite 75% of the preferred stockholders, and denies that this defendant, by any fraudulent and wrongful action and conspiracy, deprived the said The Struthers Furnace Company of the right to sell its bonds for the purpose of raising needed money to carry on and prosecute the business of said company, and denies all manner of unlawful and fraudulent conspiracies as in said petition alleged; that this defendant has no knowledge or information as to the amount of stock held or controlled by said W. C. Runyon, or whether said W. C. Runyon controlled the holders of a majority of the stock of said company, and therefore this defendant neither admits nor denies said allegation of said petition.

12. This defendant admits that some time after the making of said contract of April 15, 1922, this defendant elected to exercise the option given to it in and by said contract and to purchase said entire bond issue of the par value of $1,500,000 at 90½% of the face value thereof, and admits that this defendant paid to said The Struthers Furnace Company the full cash amount required by said contract and delivered to or for the

account of said The Struthers Furnace Company said 3,000 shares of the preferred capital stock of said The Struthers Furnace Company in accordance with the terms of said contract; that in return therefor this defendant received from said The Guardian Savings and Trust Company, Trustee, or there was delivered upon this defendant's order, the said $1,500,000 par value of bonds. This defendant denies that said contract was in any respects illegal or invalid, and denies that the transfer agent of said corporation assumed to issue a certificate for 3,000 shares of the preferred stock so delivered in part payment for said bonds, and denies that this defendant knew that with or without the consent of The Struthers Furnace Company said Trustee was without authority of law to exchange the preferred stock of said company for bonds of said company; that this defendant has no knowledge as to whether or not said stock was attempted to be redeemed by said company out of any redemption fund accumulated for that purpose out of net surplus profits, but avers the fact to be that said stock was sold and delivered to said company in accordance with the terms of said contract; that said The Struthers Furnace Company received, in addition to said 3,000 shares of stock, the full amount of cash provided for in and by said contract, and this defendant denies that The Struthers Furnace Company was without authority of law to redeem or retire said preferred stock by the issuing of bonds in payment therefor, and was without authority of law to redeem or to purchase the stock held by this defendant, and denies that this defendant well knew that said stock was not being redeemed or retired by said company out of any redemption fund accumulated out of the net surplus profits of said company, but avers the fact to be that said stock was purchased by said company from this defendant, and that said company, in making said purchase, had full power and lawful authority so to do.

13. This defendant denies that A. B. Leach & Co., Inc. has full knowledge of the serial numbers, denominations and identity of the particular bonds delivered to this defendant in exchange for said preferred stock, but avers the fact to be that this defendant has no knowledge as to the serial numbers, denominations or identity of the particular bonds which were in part paid for by said 3,000 shares of the preferred capital stock of said The Struthers Furnace Company.

14. This defendant admits that on or about the 24th day of July, 1925, the said plaintiff tendered to the representative of this defendant at Cleveland, Ohio, a certain certificate for 3,000 shares of the preferred capital stock of The Struthers Furnace Company, executed on the 13th day of July, 1922, standing in the name of W. C. Runyon, Trustee, and by him endorsed to The Struthers Furnace Company under date of January 20, 1923, and bearing also the endorsement of said plaintiff under date of May 13, 1925, and that said plaintiff, at the time of the making of said tender, made a demand for the return of certain bonds, and that said demand was refused by this defendant; that this defendant has no knowledge or information as to whether or not the certificate so tendered was or is the certificate evidencing the original 3,000 shares delivered by this defendant to said The Struthers Furnace Company pursuant to said contract of April 15, 1922, or as to whether or not said plaintiff has made good its said tender by depositing said stock certificate in the custody of the Clerk of this Court.

WHEREFORE, having fully answered the foregoing petition, this defendant prays that the same may be dismissed at plaintiff's costs.

A. B. LEACH & CO., INC.,
By NEWMAN, POPPENHUSEN, STERN & JOHNSTON,
DAY & DAY,
Its Attorneys.

AMENDED ANSWER OF A. B. LEACH & CO., INC., DEFENDANT, TO THE PETITION OF HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY, PLAINTIFF.

(Filed Jan. 23, 1926.)

Now comes A. B. Leach & Co., Inc., a corporation, defendant, and, leave of Court first had, files this its amended answer, to the petition of Hugh W. Grant, Receiver of The Struthers Furnace Company, Plaintiff, heretofore filed herein, says:

1. This defendant admits the allegations in the first paragraph of said petition contained.

2. This defendant admits the allegations in the second paragraph of said petition contained, save and except the allegation therein made that this action is brought by said Receiver by virtue of authority so to do granted to him by the court of his appointment; that this defendant has no knowledge or information as to the authority granted to said Receiver to bring said action and therefore neither admits nor denies said allegations of the petition but requires said plaintiff to make strict proof thereof.

3. This defendant admits that on or about the 15th day of December, 1919, The Struthers Furnace Company, pursuant to the authorization of its stockholders and directors by action duly taken, increased the capital stock of said corporation from $1,000,000.00 to $2,250,000.00 par value, by the addition of $1,250,000.00 of 7% cumulative preferred stock, but this defendant denies that in the resolutions authorizing said increase of said capital stock and the issuing of said preferred stock it was provided, among other things, that said preferred stock should be redeemed by the said The Struthers Furnace Company only out of the net surplus profits of the company at any quarter-annual dividend payment and only out of a redemption fund set aside out of said net surplus profits each year for that particular purpose, but avers the fact to be that it was and is provided in the resolutions authorizing the issuance of said preferred stock and in the certificate evidencing said stock that "the whole or any part of the preferred stock may be called for redemption at any time by the Company upon not less than thirty days' prior notice at $105.00 per share plus all unpaid, accrued and accumulated dividends thereon; that the Company shall, during the year beginning January 1, 1922, and during each year beginning January 1 thereafter, set aside out of surplus profits and apply to the redemption and retirement of preferred stock on or before March 1 of each year, beginning March 1, 1922, an amount in each year of the first five year period beginning January 1, 1922, of not less than ten per cent. for each year of the second five year period beginning January 1, 1927, not less than fifteen per cent. and for each year thereafter, beginning January 1, 1932, not less than twenty per cent of the net surplus profits of the Company, for the preceding year re-

maining after the payment of preferred dividends and all taxes, including any state and federal income or excess profits tax, such redemption and retirement to be (1) by purchase in the market at not exceeding the redemption price, or (2) by calls for redemption"; that it is not provided in and by said resolutions or by said certificates evidencing said preferred stock that said The Struthers Furnace Company should redeem said preferred stock only out of net surplus profits of the company and only out of a redemption fund set aside out of said surplus profits for that particular purpose, nor is it provided in and by said resolutions that the method of redemption therein referred to shall be the only or exclusive method of redeeming or retiring said preferred stock.

4. That it is provided in and by said resolutions that no mortgage or other lien other than a purchase money mortgage shall be placed upon the real estate, plant or equipment of the company, except with the affirmative vote or consent in writing of the holders of three-quarters in amount of the preferred stock of said issue then outstanding.

5. That on the 29th day of November, 1919, The Struthers Furnace Company entered into a contract with A. B. Leach & Co., Inc., by the terms of which A. B. Leach & Co. Inc., undertook to purchase from said The Struthers Furnace Company said issue of $1,250,000.00 cumulative preferred stock of The Struthers Furnace Company, subject, however, to certain terms and conditions in said agreement set forth; that said contract does not refer to or make a part thereof the terms or conditions to be set forth in said resolutions of the stockholders and/or directors of said company; and this defendant denies that said A. B. Leach & Co. knew all of the conditions as to the redemption of said stock or that said stock could be redeemed only out of the net surplus profits of the company, but admits that said A. B. Leach & Co. Inc. was, after the making of the same, familiar with the resolutions adopted by the stockholders and directors of said The Struthers Furnace Company and the terms and provisions of said preferred stock certificates.

6. This defendant admits that said A. B. Leach & Co. Inc. and its associates purchased all of said preferred capital stock of said The Struthers Furnace Company.

7. This defendant admits that on the 5th day of March, 1922, at meetings of the stockholders and directors of The Struthers Furnace Company duly and regularly held upon proper notice, The Struthers Furnace Company authorized the making and execution to The Guardian Savings and Trust Company as Trustee of a corporate mortgage securing an issue of $1,500,000.00 First Mortgage Sinking Fund 8% Gold Bonds of The Struthers Furnace Company, and admits that on the 5th day of May, 1922, this defendant was the owner of 3,000 shares of the preferred capital stock of the said corporation and that prior to said meetings on the 5th day of May, 1922, this defendant executed and delivered to the secretary of said company a written consent and proxy by the terms of which this defendant appointed W. C. Runyon, W. C. Runyon, Jr., and George A. Coulton, or any one or more of them, as attorney and proxy in its place and stead to appear and to vote, consent and act in respect to all stock of said company standing in the name of A. B. Leach & Co., Inc. at a special meeting of its stockholders on the 5th day of May, 1922, and further consenting and agreeing that said company, by and through its officers and directors, might authorize, issue and dispose of an issue of bonds of the company, not to exceed $1,500,000.00, and secure the payment of the principal and interest of said bonds by a mortgage on the real estate, plant and equipment of the company, but this defendant is not advised as to whether or not, at said meeting of the stockholders, the said 3,000 shares then held and owned by this defendant were voted by the proxies or any of them named in said written consent and proxy in favor of the issuing of said bonds and the issuing of said mortgage, or whether said 3,000 shares were necessary in order to make up 75% of the outstanding preferred stock requisite to the making of said mortgage, but this defendant avers that stockholders owning and holding more than three-fourths of the preferred capital stock of The Struthers Furnace Company executed and delivered to the secretary of the company said consents and proxies prior to the holding of said meeting on the 5th day of May, 1922.

8. This defendant admits that The Struthers Furnace Company, on or about the 18th day of May, 1922, made, executed and delivered to The Guardian Savings and Trust Company, Trustee, of Cleveland, Ohio, its first mortgage on the real estate, plant and equipment of The

Struthers Furnace Company securing said issue of $1,500,000.00 first mortgage bonds, but this defendant denies that the authorization of the Board of Directors and of the stockholders of The Struthers Furnace Company was procured through the co-operation of this defendant, save and except as this defendant, as a holder of preferred stock, assented thereto by the execution and delivery of said consent and proxy.

9. This defendant admits that on the 15th day of April, 1922, this defendant entered into a contract with The Struthers Furnace Company, in letters and figures as follows, to-wit:

"Agreement made this 15th day of April, 1922, between The Struthers Furnace Company, an Ohio corporation, hereinafter called the 'Furnace Company,' party of the first part, and A. B. Leach & Co., Inc., a New York corporation, hereinafter called 'Leach Company,' party of the second part.

"Whereas, the Furnace Company intends to provide for an issue of One Million Five Hundred Thousand Dollars ($1,500,000) principal amount of First Mortgage and Collateral Trust 8% Sinking Fund Gold Bonds to be secured by a First Mortgage and Collateral Trust Indenture, both more particularly described in Exhibit 'A,' hereto annexed, and made a part hereof; and

"Whereas, Furnace Company desires to make arrangements for the sale of said bonds, and for that purpose to give unto the Leach Company the right, privilege and option of buying said bonds or any part thereof and of forming a Syndicate to dispose of the same; and

"Whereas, Leach Company desires the right, at its election, to buy said bonds or a part thereof and form a syndicate to dispose of the same;

"Now, Therefore, in consideration of the premises, the sum of One Dollar ($1.00) paid by Leach Company to Furnace Company, and other valuable considerations, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the parties hereto agree as follows:

"1. The Furnace Company agrees to and hereby does give and grant unto Leach Company the right, privilege and option to purchase the whole or

any part of the said issue of bonds at the price of 90 and accrued interest, and to form a syndicate to dispose of the same on such terms and conditions as Leach Company shall fix and determine.

"2. The Furnace Company agrees that in the event Leach Company shall exercise its right to purchase any of said bonds and to form a syndicate to dispose thereof, that it will sell and deliver the same to Leach Company at the price of 90 and accrued interest.

"3. The Furnace Company further agrees in the event that the Leach Company shall exercise its option to purchase any of said bonds and form a syndicate to sell the same, that the Leach Company shall pay for the first Eight Hundred Thousand Dollars ($800,000) par value of said bonds or any part, at the price of 90 and accrued interest in cash upon delivery. In the event that further of said bonds are taken, Leach Company shall have the right to take and pay for any part of Four Hundred and Fifty Thousand Dollars ($450,000), par value thereof, on the following basis:

For every $1,500 par value of bonds at the price of 90 per cent and accrued interest, there shall be paid ten shares of the Furnace Company's preferred stock at $85 per share and accrued dividend, the balance to be paid in cash.

"The remainder of said bonds, viz., Two Hundred and Fifty Thousand Dollars ($250,000), par value may be taken and paid for at the election of Leach Company at the price of 90 and accrued interest.

"4. The Furnace Company agrees to furnish to Leach Company at once certified copies of earning statements approximately substantiating the figures given in Exhibit 'A' hereto annexed for the years 1917 to 1921, both inclusive, also appraisals of the properties of the party of the first part, properly sworn to, substantiating the figures given in said Exhibit 'A'.

"5. The Furnace Company agrees to submit to its stockholders and directors in due and proper form the matter of the authorization and issue of said bonds and the giving of said mortgage to secure the same, and upon the approval thereof by said

stockholders and directors to deliver to Leach Company certified copies of resolutions of its stockholders and directors authorizing said issue of bonds and the execution of the Indenture securing the same, together with a certified copy of the consent of the stockholders in respect thereto, and the opinion of its counsel as to the validity of said issue of bonds and the Indenture securing the same, and that all legal requirements have been complied with.

"6. It is mutually understood and agreed between the parties hereto that if at the time of the issuance of said bonds, bonds of the same class bearing a lower rate of interest may be sold, the interest provided to be paid on said bonds may be less than eight per cent. (8%), the rate of interest, however, to be left entirely to the discretion of Leach Company which shall have the right to fix the same.

"7. It is mutually understood and agreed between the parties hereto that the option hereby granted unto Leach Company shall run for a period of two (2) weeks from the date of the receipt by it of the data and all papers hereinabove referred to and agreed to be so furnished by the Furnace Company.

"8. Leach Company agrees, upon receipt of the papers aforesaid, to put forth its earnest efforts in an endeavor to form a syndicate to dispose of said bonds.

"9. Leach Company agrees, in the event that it exercise the option aforesaid, to take and pay for the said bonds from time to time, either in cash and/or cash and stock, as provided in paragraphs 2 and 3 hereof, in the amounts as and when called for, within one hundred and twenty-five (125) days from the date of the exercise of said option by it.

"10. This contract is subject to the ratification and approval of the authorization and issue of said bonds and mortgage by the stockholders and directors of the Furnace Company.

"In Witness Whereof, the Furnace Company has hereunto caused this agreement to be signed in its name by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed, attested by its secretary, by order of its Board of Directors, and Leach Company has hereunto caused

the same to be signed in its name by one of its vice-presidents as of the day and year first above written.

THE STRUTHERS FURNACE COMPANY

(Seal) By .....

Attest:

.....

Secretary

Attest:

A. B. LEACH & CO., INC.

By .....

(Seal) *Vice-President*

.....

Secretary."

10. This defendant denies that A. B. Leach & Co., Inc. well knew that The Struthers Furnace Company was without authority of law to issue bonds in redemption of or in payment of its preferred stock or any part thereof, and denies that said The Struthers Furnace Company was without authority of law to issue bonds in redemption of or in payment of its preferred stock or to purchase its preferred stock and pay therefor with bonds, and denies that this defendant well knew that said preferred stock could only be redeemed and returned at specified times when chosen by lot and then only out of a redemption fund accumulated from net surplus profits and denies that said preferred stock could only be so redeemed and returned, and denies that this defendant voted the said 3,000 shares of the preferred stock at the directors' meeting authorizing said first mortgage, and denies that this defendant well knew that without said 3,000 shares the required 75% of the preferred stock could not be obtained.

11. This defendant denies that A. B. Leach & Co., Inc. entered into said contract of April 15, 1922 well knowing the invalidity of said contract and well knowing and believing that the preferred stock it then held was of doubtful value, but avers the fact to be that this defendant was advised by counsel learned in the law, prior to the making and execution of said contract of April 15, 1922, that the exchange of said preferred stock for said first mortgage bonds was lawful and valid, and is now advised by counsel, and on such information and

belief states the fact to be, that said exchange was and is valid; and this defendant denies that it ever fraudulently conspired with W. C. Runyon, President or Vice President of The Struthers Furnace Company, to enter into said contract of April 15, 1922, or that this defendant conspired with any other person or persons, as alleged in said petition, and denies that this defendant fraudulently and wrongfully conspired with said Runyon so as to enable this defendant to acquire said bonds for its stock, to vote at said stockholders' meeting of May 5, 1922 its said 3,000 shares of preferred stock in order to make up the requisite 75% of the preferred stockholders, and denies that this defendant, by any fraudulent and wrongful action and conspiracy, deprived the said The Struthers Furnace Company of the right to sell its bonds for the purpose of raising needed money to carry on and prosecute the business of said company, and denies all manner of unlawful and fraudulent conspiracies as in said petition alleged; that this defendant has no knowledge or information as to the amount of stock held or controlled by said W. C. Runyon, or whether said W. C. Runyon controlled the holders of a majority of the stock of said company, and therefore this defendant neither admits nor denies said allegation of said petition.

12. This defendant admits that some time after the making of said contract of April 15, 1922 this defendant elected to exercise the option given to it in and by said contract and to purchase said entire bond issue of the par value of $1,500,000 at 90½% of the face value thereof, and admits that this defendant paid to said The Struthers Furnace Company the full cash amount required by said contract and delivered to or for the account of said The Struthers Furnace Company said 3,000 shares of the preferred capital stock of said The Struthers Furnace Company in accordance with the terms of said contract; that in return therefor this defendant received from said The Guardian Savings and Trust Company, Trustee, or there was delivered upon this defendant's order, the said $1,500,000 par value of bonds. This defendant denies that said contract was in any respects illegal or invalid; and denies that the transfer agent of said corporation assumed to issue a certificate for 3,000 shares of the preferred stock so delivered in part payment for said bonds, and denies that this defendant knew that with or without the consent of The Struthers Fur-

nace Company said Trustee was without authority of law to exchange the preferred stock of said company for bonds of said company; that this defendant has no knowledge as to whether or not said stock was attempted to be redeemed by said company out of any redemption fund accumulated for that purpose out of net surplus profits, but avers the fact to be that said stock was sold and delivered to said company in accordance with the terms of said contract; that said The Struthers Furnace Company received, in addition to said 3,000 shares of stock, the full amount of cash provided for in and by said contract, and this defendant denies that The Struthers Furnace Company was without authority of law to redeem or retire said preferred stock by the issuing of bonds in payment therefor, and was without authority of law to redeem or to purchase the stock held by this defendant, and denies that this defendant well knew that said stock was not being redeemed or retired by said company out of any redemption fund accumulated out of the net surplus profits of said company, but avers the fact to be that said stock was purchased by said company from this defendant, and that said company, in making said purchase, had full power and lawful authority so to do.

13. This defendant denies that A. B. Leach & Co., Inc. has full knowledge of the serial numbers, denominations and identity of the particular bonds delivered to this defendant in exchange for said preferred stock, but avers the fact to be that this defendant has no knowledge as to the serial numbers, denominations or identity of the particular bonds which were in part paid for by said 3,000 shares of the preferred capital stock of said The Struthers Furnace Company.

14. This defendant admits that on or about the 24th day of July, 1925, the said plaintiff tendered to the representative of this defendant at Cleveland, Ohio, a certain certificate for 3,000 shares of the preferred capital stock of The Struthers Furnace Company, executed on the 13th day of July, 1922, standing in the name of W. C. Runyon, Trustee, and by him endorsed to The Struthers Furnace Company under date of January 20, 1923, and bearing also the endorsement of said plaintiff under date of May 13, 1925, and that said plaintiff, at the time of the making of said tender, made a demand for the return of certain bonds, and that said demand was refused

by this defendant; that this defendant has no knowledge or information as to whether or not the certificate so tendered was or is the certificate evidencing the original 3,000 shares delivered by this defendant to said The Struthers Furnace Company pursuant to said contract of April 15, 1922, or as to whether or not said plaintiff has made good its said tender by depositing said stock certificate in the custody of the Clerk of this Court.

15. Further answering this defendant says that the contract of purchase of said issue of $1,500,000.00, par value, of bonds of The Struthers Furnace Company has been long since fully executed and performed by both The Struthers Furnace Company and this defendant, as is more specifically set forth in paragraph numbered 12, above; and that the execution and performance of said contract by each of said parties thereto was with full knowledge by The Struthers Furnace Company of the scope and extent of its corporate power as same relates to said acts and/or contracts of which the plaintiff complains, and with said knowledge The Struthers Furnace Company permitted this defendant to purchase said bonds, in part, by exchanging said preferred stock therefor and in great part for cash, in reliance upon the legality of said contract to purchase and the legality of The Struthers Furnace Company's assent thereto; that since the purchase of said bonds, and with such knowledge, The Struthers Furnace Company permitted this defendant to sell all of said bonds to the public and since said purchase has continued to pay interest thereon and to treat the same as valid obligations of The Struthers Furnace Company until shortly before the appointment of the plaintiff herein as its receiver and that, by reason of said facts, said receiver and The Struthers Furnace Company are estopped to deny the power of The Struthers Furnace Company to exchange said bonds, in part, for preferred stock of The Struthers Furnace Company, or to deny that said bonds were not and are not valid obligations of said The Struthers Furnace Company.

WHEREFORE, having fully answered the foregoing petition, this defendant prays that the same may be dismissed at plaintiff's costs.

A. B. LEACH & COMPANY, INC.
By NEWMAN, POPPENHUSEN, STERN & JOHNSTON, and DAY & DAY,

Its Attorneys.

State of Ohio,
Cuyahoga County, ss.

Donald W. Kling, being first duly sworn, deposes and says that he is one of counsel for the defendant, A. B. Leach & Co., Inc., a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said state of New York, and that the facts and allegations contained in its amended answer are true, as he verily believes.

DONALD W. KLING.

SWORN TO BEFORE ME, and subscribed in my presence, this 23rd day of January, A. D. 1926.

G. E. OFFENBACHER,
Notary Public in and for Cuyahoga County.

(Seal)

REPLY OF HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY TO THE AMENDED ANSWER OF A. B. LEACH & CO. INC.

(Filed Jan. 30, 1926.)

Now comes the plaintiff and for his reply to the amended answer of the defendant herein:

Admits that in the Resolution of the Directors of The Struthers Furnace Company adopted December 15th, 1919, looking to the issuance of the preferred stock of said corporation and printed upon the face of the certificate of the preferred stock so issued pursuant to said authorization there occurs the phraseology set forth in the plaintiff's petition among other things but avers that the material portions of said Resolution, the sub-

stance and purport of which is printed upon said stock certificates, is as follows among other things:

"The preferred stock shall be subject to redemption in whole or in part, at the option of the Company, on any quarterly dividend paying date at One Hundred and Five Dollars ($105) per share plus all unpaid accrued and accumulated dividends thereon, such redemption to be upon the notice and in the manner hereinafter set forth with respect to the redemption of stock provided to be called and redeemed by the Company.

"During the year beginning January 1, 1922, and during each year beginning January 1 thereafter, so long as any of said preferred stock remains outstanding, the Company shall set aside out of its surplus profits and apply to the redemption and retirement of said preferred stock as hereinafter provided, an amount in each year, for the first five (5) year period beginning January 1, 1922, of not less than ten per cent. (10%), for each year of the second five (5) year period beginning January 1, 1927, of not less than fifteen per cent (15%) and for each year thereafter beginning January 1, 1932, of not less than twenty per cent (20%) of the net surplus profits of the Company for the preceding year remaining after payment of preferred dividends and all taxes, including any State or Federal income or excess profits taxes.

"The percentage of net surplus profits so required to be set aside for the redemption and retirement of preferred stock shall be deposited by the Company with the Transfer Agent of said stock on or before March 1st, of each year beginning March 1, 1922, and shall be applied by said Transfer Agent to the redemption of preferred stock to be redeemed by the Company by purchase or call, as hereinafter set forth.

"The redemption of preferred stock so required to be made from the net surplus profits of the Company as above provided can be made by the purchase by the Company in the market or preferred stock of said issue, provided the same can be purchased at a price not exceeding One Hundred and Five Dollars ($105) per share plus accrued and accumulated unpaid dividends thereon, but if the

amount required to be redeemed cannot be so purchased for such price, the amount of preferred stock needed to exhaust the percentage of net surplus profits required to be set aside in such year for such redemption shall be called by the Company and redeemed at the redemption price of One Hundred and Five Dollars ($105) per share plus accrued and accumulated unpaid dividends thereon. All stock redeemed, either by purchase or call, shall be forthwith cancelled and shall not be re-issued.

"In all cases of redemption of preferred stock by call the Company shall, if less than the entire amount of outstanding preferred stock is to be redeemed, select such stock by lot at least thirty (30) days prior to the date when the same is to be redeemed, notice of which call and redemption shall be given by registered letter directed to the stockholders whose stock is chosen for redemption, at their respective addresses then appearing on the books of the Company, mailed at least thirty (30) days prior to the date fixed for redemption or in event the entire amount of preferred stock is to be redeemed, then such notice shall be mailed to all the holders of all the outstanding preferred stock, and on such redemption date all rights with respect to such stock, except the right to receive the redemption price therefor, shall cease and determine."

The plaintiff denies that the defendant did not know of the intent and purport of said Resolution and limitation upon the right to redeem said preferred stock or to purchase the same in the open market, or to exchange the same for bonds.

He denies, though the same is unnecessary, the averments of the defendant's answer as to the validity and legality of those transactions and the conclusions of law set forth in said answer.

He denies that the exchange of its bonds for the preferred stock held by the defendant was made with full knowledge by The Struthers Furnace Company of the scope and extent of its corporate power as the same related to the acts and contracts of which the plaintiff complains, and especially denies that the common stockholders and creditors, now represented as to their finan-

cial interests by this Receiver, were affected by any such knowledge.

He denies that since the purchase of said bonds The Struthers Furnace Company knowingly permitted this defendant to sell all of said bonds to the public and especially denies that the common stockholders and creditors of said Company were cognizant of said sales by the defendant.

Admits that certain interest was paid upon the bonds outstanding by The Struthers Furnace Company but denies that the Company continued to treat the bonds involved in this case as a valid obligation of The Struthers Furnace Company until shortly before the appointment of this plaintiff as Receiver, and specifically denies that the stockholders treated said bonds and especially the bonds so exchanged for stock as a valid obligation of The Struthers Furnace Company but in this connection specifically avers in reply to the pleading of the defendant set up in this case that shortly thereafter to-wit, November 13, 1922, and before any interest became due upon said bonds that a stockholder of said corporation owning three hundred shares of stock which had not been voted at said stockholders' meeting authorizing the issuance of said bonds, and who was without knowledge of the optional contract theretofore entered into between The Struthers Furnace Company and A. B. Leach and Company, Inc. looking to the purchase of said bonds when issued, to-wit, Frank C. Kane commenced an action on his own behalf and on the behalf of other stockholders in the Court of Common Pleas of Cuyahoga County, Ohio, against A. B. Leach and Company, Inc., The Guardian Savings and Trust Company as Trustee, and The Struthers Furnace Company, being case No. 205671 in said Court, attacking the validity of said bond issue and the validity of the exchange of bonds for said stock of The A. B. Leach and Company, Inc. and praying for equitable relief and the cancellation of said bonds and that said stock may be returned to A. B. Leach and Company, Inc. and avers that before said case came on for trial that The Struthers Furnace Company, without the knowledge, acquiescence or consent of the stockholders on whose behalf as well as on behalf of the creditors of said Company this action is brought, terminated said action by the purchase of the three hundred shares of the stock of said plaintiff

so owned by said Kane, of all of which facts as aforesaid the said A. B. Leach and Company, Inc., The Guardian Savings and Trust Company had full cognizance at all times, and that at the same time a suit was brought by said Kane in the Court of Common Pleas of Mahoning County, Ohio, the subject and purport of which was to procure an order for an inspection of the books and records and contracts including said optional contract, which case was, as aforesaid, terminated by the plaintiff without the knowledge of the stockholders, save and except of those controlling the majority of stock of said corporation.

WHEREFORE the defendant denies that he as Receiver of The Struthers Furnace Company is estopped to maintain this action from the matters and things averred in his petition and to receive the relief prayed for by reason of any of the matters and things alleged in said answer and he prays for the relief as in his petition.

WILSON, HAHN, HENDERSON & WILSON,
Attorneys for Plaintiff.

STATE OF OHIO,
MAHONING COUNTY, SS.

HUGH W. GRANT, being first duly sworn, says that he is the plaintiff herein; that the facts stated and allegations contained in the foregoing reply are true as he verily believes.

HUGH W. GRANT.

Sworn to before me and subscribed in my presence this 29th day of January, 1926.

H. HERSCHEL HUNT,
(Seal) *Notary Public.*

MOTION.

(Filed April 21, 1926.)

Comes now A. B. Leach and Company, Inc., the above named defendant, by its attorneys, Day and Day and Newman, Poppenhusen, Stern and Johnston, and moves this Honorable Court that an order be entered directing that so much of the testimony as has been reproduced in the exact words of the witnesses in the statement of evidence prepared by the defendant with the consent of the plaintiff, be reproduced in the exact words of the witnesses.

NEWMAN, POPPENHUSEN, STERN & JOHNSTON,
DAY & DAY,
Counsel for Defendant.

ORDER DIRECTING THAT CERTAIN TESTIMONY BE REPRODUCED IN VERBATIM FORM.

(Entered Apr. 21, 1926, by D. C. Westenhaver, Judge.)

This matter coming on to be heard this 21st day of April, 1926, on motion of the above named defendant that an order be entered directing that so much of the testimony as has been reproduced in the exact words of the witnesses in the statement of evidence prepared by the defendant, in connection with its appeal from a decree in the above entitled cause, be reproduced in the exact words of the witnesses; and it appearing to the Court that statement of the evidence has been prepared herein by the defendant and submitted to the plaintiff and his attorneys, and that the plaintiff's attorneys have approved in all things the statement of the evidence prepared by the plaintiff and have agreed that an order

may be entered by the Court as prayed by plaintiff, and it appearing to the Court that it is necessary to a proper understanding of the evidence that so much of the evidence as has been reproduced in the exact words of the witnesses in the statement of the evidence be reproduced in the exact words of the witnesses,

IT IS HEREBY ORDERED AND DIRECTED that so much of the evidence as has been reproduced in the exact words of the witnesses in the statement of the evidence prepared by the defendant, with the consent and approval of the plaintiff, be reproduced in the exact words of the witnesses in the statement of the evidence required by Equity Rule No. 75.

ORDER APPROVING STATEMENT OF EVIDENCE.

(Entered Apr. 21, 1926, by D. C. Westenhaver, Judge.)

Now comes the defendant and presents to the Court its certain narrative form of testimony taken at the trial of this cause, which being found by the Court to be true, is allowed, signed and sealed, and is hereby ordered to be filed in this cause.

STATEMENT OF EVIDENCE.

Be it remembered and certified that on the hearing of this cause upon the plaintiff's bill, the defendant's amended answer and the plaintiff's reply thereto, said plaintiff appeared by Messrs. Wilson and Henderson of the firm of Wilson, Hahn, Henderson & Wilson, and that the defendant appeared by Mr. W. L. Day of the firm of Day & Day, and Edward R. Johnston of the firm of Newman, Poppenhusen, Stern & Johnston.

That said cause came on duly to be heard at Cleveland, Ohio and that the taking of testimony in open court began on February 10, 1926.

That during the hearing of said cause the following evidence was offered, admitted or excluded, as hereinafter stated, and that the following proceedings were had, that is to say:

Plaintiff, in order to sustain the averments of his bill, introduced the following testimony and evidence and the following proceedings were had:

PLAINTIFF'S CASE IN CHIEF.

Mr. Wilson: I desire to introduce the original Certificate of Incorporation of Struthers Furnace Company in order to show the purpose for which this company was incorporated.

The document above referred to was thereupon received in evidence as Plaintiff's Exhibit 1 and is as follows:

PLAINTIFF'S EXHIBIT NO. 1.

These Articles of Incorporation of The Struthers Furnace Company,

WITNESSETH, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation for profit under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be The Struthers Furnace Company.

Second. Said corporation is to be located at Cleveland, Cuyahoga County, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of manufacturing, purchasing, selling and dealing in coke, pig-iron, rails, bars and, in general, all products of iron and steel, and of doing all things incident thereto.

Fourth. The capital stock of said corporation shall be Two Hundred Thousand Dollars ($200,000), divided into two thousand (2,000) shares of One Hundred Dollars ($100) each.

In Witness Whereof, We have hereunto set our hands this 18th day of May, A. D. 1896.

A. C. Dustin,
H. H. McKeehan,
W. C. Merrick,
C. A. Judson,
Gustav von den Steinen.

State of Ohio,
Cuyahoga County, ss.

Before me, the undersigned, a Notary Public in and for said county in said State, personally came A. C. Dustin, H. H. McKeehan, W. C. Merrick, C. A. Judson and Gustav von den Steinen, to me personally known and known to be the persons described in and who executed the foregoing instrument, and acknowledged that they signed the same freely and voluntarily and that the same is their free act and deed for the purposes therein expressed.

In Witness Whereof, I hereunto set my hand and official seal this 18th day of May, 1896.

Chas. F. Lang,
(Seal) *Notary Public.*

The State of Ohio,
Cuyahoga County, ss.

I, Harry L. Vail, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, aforesaid, do hereby certify that Chas. F. Lang, before whom the annexed acknowledgment was taken, was at the date thereof, a Notary Public in and for said County, duly authorized by the laws of Ohio to take the same; and I am well acquainted with his handwriting and believe his signature thereto is genuine.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at Cleveland, this 19th day of May, A. D. 1896.

(Seal) HARRY L. VAIL, *Clerk.*

UNITED STATES OF AMERICA,
STATE OF OHIO, SS.
OFFICE OF THE SECRETARY OF STATE.

I, SAMUEL M. TAYLOR, Secretary of State of the State of Ohio, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of "THE STRUTHERS FURNACE COMPANY," filed in this office on the 20th day of May, A. D. 1896, and recorded in Volume 66, Page 486, of the Records of Incorporations.

WITNESS my hand and official seal, at Columbus, Ohio, this 20th day of May, A. D. 1896.

(Signed) SAMUEL M. TAYLOR,

(Seal) *Secretary of State.*

Mr. Wilson: I offer in evidence the certified copy of the Articles of Incorporation increasing the capital stock and the Certificate of Amendment of Articles of Incorporation by increase of capital stock, which was filed on the same day.

The documents last above referred to were thereupon received in evidence as Plaintiff's Exhibits 2 and 3 respectively and are as follows:

PLAINTIFF'S EXHIBIT NO. 2.

(Filed Dec. 17, 1919.)

Certificate of Increase of Capital Stock of The Struthers Furnace Company.

Corp. No. 13127.

To the Secretary of State,

Columbus, Ohio.

W. C. Runyon, Jr. vice president, and A. Grossman, Secretary of The Struthers Furnace Company, duly authorized in the premises and acting on behalf of said Company, do hereby certify that on December 15, 1919, the authorized capital stock of said company, consisting of Ten Thousand (10,000) shares of the par value of One Hundred Dollars ($100.00) each, was paid for, issued and outstanding; that a meeting of the stockholders of said company was duly called by more than a majority of the Directors of said Company to be held at the office of the Company, Cleveland, Ohio, on December 15, 1919, and that notice of the time, place and object of said meeting was duly waived in writing by all the stockholders of said Company; that at said meeting the written consent of all of the stockholders of said Company was given for increasing the capital stock of the Company, as set forth in the resolution hereinafter following, and that all of the stockholders of said Company also at said meeting voted in favor of the adoption of a resolution in the following words and figures, to-wit:

> Resolved, that the capital stock of the Company consisting of ten thousand (10,000) shares of One Hundred Dollars ($100.00) each be increased to twenty-two thousand five hundred (22,500) shares, such increased capital stock, to-wit: Twelve Thousand five hundred (12,500) shares of the par value of One Hundred Dollars ($100.00) each shall be preferred stock, and Article Fourth of the Articles of Incorporation of the company be and the same shall read as follows.
>
> Fourth: The capital stock of said company, preferred and common, shall be Two Million Two Hundred and Fifty Thousand Dollars ($2,250,000) consisting of ten thousand (10,000) shares of common stock of the par value of One Hundred Dollars ($100.00) each, and twelve thousand five hundred

(12,500) shares of preferred stock of the par value of One Hundred Dollars ($100.00) each, and the designations, preferences and voting powers or restrictions or qualifications thereof attached to said preferred and common stock shall be as follows:

The holders of the preferred stock shall be entitled to receive from the surplus profits of the Company dividends at the rate of seven per cent (7%) per annum, payable quarterly on the first day of February, May, August and November in each year, in preference to and priority over any dividends upon the common stock, and no other dividends. Dividends on the preferred stock shall be cumulative from the quarterly dividend payment date next preceding the date of the original issue of each share thereof, so that if in any quarterly dividend period dividends at the rate of seven percent (7%) per annum shall not have been paid on said stock, the deficiency shall be paid before any dividends shall be paid on the common stock.

The preferred stock shall be preferred both as to earnings and assets and, in event of any voluntary liquidation, dissolution or winding up of the Company, or upon any voluntary distribution of its assets other than by way of dividends from its surplus profits or redemption of its preferred stock as herein provided, the holders of the preferred stock shall be entitled to receive, for and in respect of such stock, the redemption price of One Hundred and Five Dollars ($105) per share, or, if such liquidation, dissolution or winding up be involuntary, the par value of such stock, in each case plus all accrued and accumulated unpaid dividends thereon, before any amount shall be paid or any assets distributed to the holders of the common stock; and after such payment to the holders of preferred stock, all remaining assets of the Company shall belong to and be divided ratably among the holders of the common stock.

Except as herein provided, the holders of the preferred stock shall not be entitled to participate in any distribution of the profits or assets of the Company, either in money or in stock, and shall not be entitled to any subscription rights in any stock hereafter issued by the Company, whether common or preferred.

The preferred stock shall be subject to redemption in whole or in part, at the option of the Company, on any quarterly dividend paying date at One Hundred and Five Dollars ($105) per share plus all unpaid accrued and accumulated dividends thereon, such redemption to be upon the notice and in the manner hereinafter set forth with respect to the redemption of stock provided to be called and redeemed by the Company.

During the year beginning January 1, 1922, and during each year beginning January 1 thereafter, so long as any of said preferred stock remains outstanding, the Company shall set aside out of its surplus profits and apply to the redemption and retirement of said preferred stock as hereinafter provided, an amount in each year, for the first five (5) year period beginning January 1, 1922, of not less than ten per cent. (10%) for each year of the second five (5) year period beginning January 1, 1927, of not less than fifteen per cent (15%) and for each year thereafter beginning January 1, 1932, of not less than twenty per cent. (20%) of the net surplus profits of the Company for the preceding year remaining after payment of preferred dividends and all taxes, including any State or federal income or excess profits taxes.

The percentage of net surplus profits so required to be set aside for the redemption and retirement of preferred stock shall be deposited by the company with the Transfer Agent of said stock on or before March 1st, of each year, beginning March 1, 1922, and shall be applied by said Transfer Agent to the redemption of preferred stock to be redeemed by the Company by purchase or call, as hereinafter set forth.

The redemption of preferred stock so required to be made from the net surplus profits of the Company as above provided can be made by the purchase by the Company in the market of preferred stock of said issue, provided the same can be purchased at a price not exceeding One Hundred and Five Dollars ($105) per share plus accrued and accumulated unpaid dividends thereon, but it the amount required to be redeemed cannot be so purchased for such price, the amount of preferred stock needed to exhaust the percentage of net surplus profits required to be set aside in such year for such redemption shall be called by the Company and redeemed at the redemption price of One Hundred and Five Dollars ($105) per share plus accrued and accumulated un-

paid dividends thereon. All stock redeemed, either by purchase or call, shall be forthwith cancelled and shall not be re-issued.

In all cases of redemption of preferred stock by call the company shall, if less than the entire amount of outstanding preferred stock is to be redeemed, select such stock by lot at least thirty (30) days prior to the date when the same is to be redeemed, notice of which call and redemption shall be given by registered letter directed to the stockholders whose stock is chosen for redemption, at their respective addresses then appearing on the books of the Company mailed at least thirty (30) days prior to the date fixed for redemption, or in event the entire amount of preferred stock is to be redeemed, then such notice shall be mailed to all the holders of all the outstanding preferred stock, and on such redemption date all rights with respect to such stock, except the right to receive the redemption price therefor, shall cease and determine.

The selection by lot of stock for redemption shall be accomplished by placing together the names of all holders of said issue of preferred stock with the number of shares set forth after each name and these names shall be drawn by the Transfer Agent of the preferred stock. The entire amount of stock standing in each name thus drawn shall be selected for redemption before succeeding names are drawn. If the redemption of the required amount of stock necessitates the redemption of a portion only of the stock standing in the name last drawn, any such portion of stock standing in such last name as may be necessary to make up the required total shall be called and redeemed on the terms hereinabove provided.

So long as any of said preferred stock remains outstanding, the Company shall at all times maintain net quick assets in an amount not less than one hundred per cent (100%) of the total par value of the preferred stock at such time outstanding. Quick assets shall be deemed to consist of cash, good accounts and bills receivable, supplies, raw material and merchandise consisting of goods manufactured and in process of manufacture, the value of such merchandise and material to be the cost price thereof, if such price be lower than the market price, or the then market price if that be lower than the cost price, and in determining the net amount of said assets there shall be deducted therefrom all ac-

counts and bills payable and other indebtedness owing by the Company.

So long as any of the preferred stock is outstanding, no dividend shall be declared or paid to the holders of the common stock, unless each and all of the accrued quarterly preferred dividends on the preferred stock, at the rate hereinabove set forth, shall have been paid or the money to pay the same set apart for that purpose, and unless all requirements with respect to the setting aside of the stipulated percentage of net surplus profits for the redemption of preferred stock shall have been complied with, and unless the net surplus profits of the Company applicable to dividends on the preferred stock then outstanding for the twelve (12) months preceding shall have been not less than one and one half (1½) times said preferred dividend requirements, and unless also the net quick assets of the Company are at such time at least equal to one hundred per cent (100%) of the outstanding preferred stock and are not reduced below such amount by the payment of such dividend upon the common stock.

The holders of the preferred stock shall have no voting power or participation in the management or control of the Company or be entitled to receive notice of stockholders' meetings, such voting rights being vested exclusively in the common stock, except in event of default by the company in the payment of four consecutive quarterly dividend installments upon the preferred stock. Upon any such default and during the continuance thereof and no longer the holders of the preferred stock shall have equal voting rights with the holders of the common stock, share for share.

No mortgage or other lien, other than a purchase money mortgage upon property subsequently acquired, shall be placed upon the real estate, plant or equipment of the Company, or any part thereof, nor shall any bonds, debentures, notes or other similar indebtedness having a maturity beyond one year be issued or created or guaranteed nor shall any additional preferred stock having priority over or parity with this issue of One Million Two Hundred and Fifty Thousand Dollars ($1,250,000) of preferred stock be issued, except in each case with the affirmative vote or assent in writing of the holders of three-fourths in amount of the preferred stock of this issue then outstanding.

The Company, so long as any of said preferred stock remains outstanding, shall cause a yearly balance sheet covering its assets and liabilities to be made by some competent certified public accountant approved by the Transfer Agent of the preferred stock, and will cause a duplicate of said audit to be delivered to said Transfer Agent not later than the 1st day of April in each year.

We further certify that at a meeting of the Board of Directors of said Company, held at the office of the Company on December 15, 1919, said increase of capital stock was approved by a resolution duly adopted by the unanimous vote of the Board of Directors of The Struthers Furnace Company.

IN WITNESS WHEREOF, said Vice President and Secretary acting on behalf of said Company, hereto subscribe said Company's name and affix the corporate seal, this December 15, 1919.

THE STRUTHERS FURNACE COMPANY

By W. C. RUNYON, JR.,
Vice President.

Attest: A. GROSSMAN, *Secretary.*

(Seal)

UNITED STATES OF AMERICA,
STATE OF OHIO,
OFFICE OF THE SECRETARY OF STATE.

I, Harvey C. Smith, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the

CERTIFICATE OF INCREASE
OF
THE STRUTHERS FURNACE COMPANY

filed in this office on the 17th day of Dec. A. D. 1919 and recorded in Volume 236, Page 186, of the Records of Incorporations.

WITNESS my hand and official seal, at Columbus, this 17th day of Dec. A. D. 1919.

(Signed) HARVEY C. SMITH,
Secretary of State.

PLAINTIFF'S EXHIBIT NO. 3.

(Filed Dec. 17, 1919.)

Certificate of Amendment of Articles of Incorporation of The Struthers Furnace Company.

Corp. No. 13127.

WHEREAS, by proceedings of the stockholders of The Struthers Furnace Company duly had on December 15, 1919, the capital stock of the Company, consisting of ten thousand (10,000) shares of One Hundred Dollars ($100.00) each, was increased to twenty-two thousand five hundred (22,500) shares of One Hundred Dollars ($100.00) each, such increased capital stock consisting of twelve thousand five hundred (12,500) shares of the par value of One Hundred Dollars ($100.00) each of preferred stock, said preferred and common stock having designations, preferences, voting powers or restrictions or qualifications thereof as provided in the resolution of the stockholders increasing the capital stock as aforesaid;

NOW, THEREFORE, in order to make the Articles of Incorporation comply with the proceedings relating to increasing the capital stock,

BE IT RESOLVED, that the Articles of incorporation of The Struthers Furnace Company be and the same hereby are amended so that Article Fourth of the Articles of incorporation shall be and the same shall read as follows:

FOURTH: The capital stock of said Company, preferred and common, shall be Two Million Two Hundred and Fifty Thousand Dollars ($2,250,000.00) consisting of ten thousand (10,000) shares of common stock of the par value of One Hundred Dollars ($100.00) each, and twelve thousand five hundred (12,500) shares of preferred stock of the par value of One Hundred Dollars ($100.00) each, and the designations, preferences, and voting powers or restrictions or qualifications thereof attached to said preferred and common stock shall be as follows:

The holders of the preferred stock shall be entitled to receive from the surplus profits of the Company dividends at the rate of seven per cent. (7%) per annum, payable quarterly on the first day of February, May, August and November in each year, in preference to and

priority over any dividends upon the common stock, and no other dividends. Dividends on the preferred stock shall be cumulative from the quarterly dividend payment date next preceding the date of the original issue of each share thereof, so that if in any quarterly dividend period dividends at the rate of seven per cent (7%) per annum shall not have been paid on said stock, the deficiency shall be paid before any dividends shall be paid on the common stock.

The preferred stock shall be preferred both as to earnings and assets and, in event of any voluntary liquidation, dissolution or winding up of the Company, or upon any voluntary distribution of its assets other than by way of dividends from its surplus profits or redemption of its preferred stock as herein provided, the holders of the preferred stock shall be entitled to receive, for and in respect of such stock, the redemption price of One Hundred and Five Dollars ($105) per share, or if such liquidation, dissolution or winding up be involuntary, the par value of such stock, in each case plus all accrued and accumulated unpaid dividends thereon, before any amount shall be paid or any assets distributed to the holders of the common stock; and after such payment to the holders of preferred stock, all remaining assets of the Company shall belong to and be divided ratably among the holders of the common stock.

Except as herein provided, the holders of the preferred stock shall not be entitled to participate in any distribution of the profits or assets of the Company, either in money or in stock, and shall not be entitled to any subscription rights in any stock hereafter issued by the Company, whether common or preferred.

The preferred stock shall be subject to redemption in whole or in part, at the option of the Company, on any quarterly dividend paying date at One Hundred and Five Dollars ($105) per share plus all unpaid accrued and accumulated dividends thereon, such redemption to be upon the notice and in the manner hereinafter set forth with respect to the redemption of stock provided to be called and redeemed by the Company.

During the year beginning January 1, 1922, and during each year beginning January 1 thereafter, so long as any of said preferred stock remains outstanding, the Company shall set aside out of its surplus profits and apply to the redemption and retirement of said pre-

ferred stock as hereinafter provided, an amount in each year, for the first five (5) year period beginning January 1, 1922, of not less than ten per cent. (10%) for each year of the second five (5) year period beginning January 1, 1927, of not less than fifteen per cent. (15%) and for each year thereafter beginning January 1, 1932, of not less than twenty per cent. (20%) of the net surplus profits of the Company for the preceding year remaining after payment of preferred dividends and all taxes, including any State or federal income or excess profits taxes.

The percentage of net surplus profits so required to be set aside for the redemption and retirement of preferred stock shall be deposited by the company with the Transfer Agent of said stock on or before March 1st, of each year, beginning March 1, 1922, and shall be applied by said Transfer Agent to the redemption of preferred stock to be redeemed by the Company by purchase or call, as hereinafter set forth.

The redemption of preferred stock so required to be made from the net surplus profits of the Company as above provided can be made by the purchase by the Company in the market of preferred stock of said issue, provided the same can be purchased at a price not exceeding One Hundred and Five Dollars ($105) per share plus accrued and accumulated unpaid dividends thereon, but if the amount required to be redeemed cannot be so purchased for such price, the amount of preferred stock needed to exhaust the percentage of net surplus profits required to be set aside in such year for such redemption shall be called by the company and redeemed at the redemption price of One Hundred and Five Dollars ($105) per share plus accrued and accumulated unpaid dividends thereon. All stock redeemed, either by purchase or call, shall be forthwith cancelled and shall not be re-issued.

In all cases of redemption of preferred stock by call the company shall, if less than the entire amount of outstanding preferred stock is to be redeemed, select such stock by lot at least thirty (30) days prior to the date when the same is to be redeemed, notice of which call and redemption shall be given by registered letter directed to the stockholders whose stock is chosen for redemption, at their respective addresses then appearing on the books of the Company mailed at least thirty

(30) days prior to the date fixed for redemption, or in event the entire amount of preferred stock is to be redeemed, then such notice shall be mailed to all the holders of all the outstanding preferred stock, and on such redemption date all rights with respect to such stock, except the right to receive the redemption price therefor, shall cease and determine.

The selection by lot of stock for redemption shall be accomplished by placing together the names of all holders of said issue of preferred stock with the number of shares set forth after each name and these names shall be drawn by the Transfer Agent of the preferred stock. The entire amount of stock standing in each name thus drawn shall be selected for redemption before succeeding names are drawn. If the redemption of the required amount of stock necessitates the redemption of a portion only of the stock standing in the name last drawn, any such portion of stock standing in such last name as may be necessary to make up the required total shall be called and redeemed on the terms hereinabove provided.

So long as any of said preferred stock remains outstanding, the Company shall at all times maintain net quick assets in an amount not less than one hundred per cent. (100%) of the total par value of the preferred stock at such time outstanding. Quick assets shall be deemed to consist of cash, good accounts and bills receivable, supplies, raw material and merchandise consisting of goods manufactured and in process of manufacture, the value of such merchandise and material to be the cost price thereof, if such price be lower than the market price, or the then market price if that be lower than the cost price, and in determining the net amount of said assets there shall be deducted therefrom all accounts and bills payable and other indebtedness owing by the Company.

So long as any of the preferred stock is outstanding, no dividend shall be declared or paid to the holders of the common stock, unless each and all of the accrued quarterly preferred dividends on the preferred stock, at the rate hereinabove set forth, shall have been paid or the money to pay the same set apart for that purpose, and unless all requirements with respect to the setting aside of the stipulated percentage of net surplus profits for the redemption of preferred stock shall have been complied with, and unless the net surplus profits of the

Company applicable to dividends on the preferred stock then outstanding for the twelve (12) months preceding shall have been not less than one and one half (1½) times said preferred dividend requirements, and unless also the net quick assets of the Company are at such time at least equal to one hundred per cent. (100%) of the outstanding preferred stock and are not reduced below such amount by the payment of such dividend upon the common stock.

The holders of the preferred stock shall have no voting power or participation in the management or control of the Company or be entitled to receive notice of stockholders' meetings, such voting rights being vested exclusively in the common stock, except in event of default by the company in the payment of four (4) consecutive quarterly dividend installments upon the preferred stock. Upon any such default and during the continuance thereof and no longer the holders of the preferred stock shall have equal voting rights with the holders of the common stock, share for share.

No mortgage or other lien, other than a purchase money mortgage upon property subsequently acquired, shall be placed upon the real estate, plant or equipment of the Company, or any part thereof, nor shall any bonds, debentures, notes or other similar indebtedness having a maturity beyond one year be issued or created or guaranteed nor shall any additional preferred stock having priority over or parity with this issue of One Million Two Hundred and Fifty Thousand Dollars ($1,250,000) of preferred stock be issued, except in each case with the affirmative vote or assent in writing of the holders of three-fourths in amount of the preferred stock of this issue then outstanding.

The Company, so long as any of said preferred stock remains outstanding, shall cause a yearly balance sheet covering its assets and liabilities to be made by some competent certified public accountant approved by the Transfer Agent of the preferred stock, and will cause a duplicate of said audit to be delivered to said Transfer Agent not later than the 1st day of April in each year.

To the Secretary of State,
Columbus, Ohio.

The Struthers Furnace Company, by its Vice President and Secretary, hereby certifies that the foregoing

is a true copy of the original amendment of the Articles of Incorporation of The Struthers Furnace Company which was adopted by the vote of the holders of the entire subscribed and issued capital stock of the Company at a meeting of the stockholders held on December 15, 1919, at three o'clock p. m. notice of which was duly waived in writing by all stockholders as authorized by law, also that said amendment was duly adopted by resolution unanimously passed by the Board of Directors of The Struthers Furnace Company at a meeting duly called and held on December 15, 1919.

IN WITNESS WHEREOF, the Vice President and Secretary of The Struthers Furnace Company, acting for and on behalf of said Company, have hereunto set their names and caused the seal of said corporation to be affixed this 15th day of December 1919.

THE STRUTHERS FURNACE COMPANY

By W. C. RUNYON, JR.,
Vice President.

Attest: A. GROSSMAN,
Secretary.

UNITED STATES OF AMERICA,
STATE OF OHIO,
OFFICE OF THE SECRETARY OF STATE.

I, Harvey C. Smith, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the

CERTIFICATE OF AMENDMENT
OF
THE STRUTHERS FURNACE COMPANY

filed in this office on the 17th day of December, A. D. 1919 and recorded in Volume 236, Page 180, of the Records of Incorporations.

WITNESS my hand and official seal, at Columbus, this 17th day of Dec. A. D. 1919.

(Seal) (Signed) HARVEY C. SMITH,
Secretary of State.

Mr. Wilson: We offer in evidence plaintiff's Exhibit 4, which is the original option contract entered into between Struthers Furnace Company and A. B. Leach & Company, Inc., dated April 15, 1922, and having attached to it certain memoranda with reference to the form of bonds which were to be issued and statements with reference to the business property, etc.

Thereupon, the document last above mentioned was received in evidence as plaintiff's Exhibit 4 and is as follows:

PLAINTIFF'S EXHIBIT NO. 4.

Agreement, dated April 15, 1922, between The Struthers Furnace Co. and A. B. Leach & Co.

AGREEMENT made this 15th day of April, 1922, between The Struthers Furnace Company, an Ohio corporation, hereinafter called the "Furnace Company," party of the first part, and A. B. Leach & Co., Inc., a New York corporation, hereinafter called "Leach Company," party of the second part.

WHEREAS, the Furnace Company intends to provide for an issue of One Million Five Hundred Thousand Dollars ($1,500,000) principal amount of First Mortgage and Collateral Trust 8% Sinking Fund Gold Bonds to be secured by a First Mortgage and Collateral Trust Indenture, both more particularly described in Exhibit "A," hereto annexed, and made a part hereof; and

WHEREAS, Furnace Company desires to make arrangements for the sale of said bonds, and for that purpose to give unto the Leach Company the right, privilege and option of buying said bonds or any part thereof and of forming a Syndicate to dispose of the same; and

WHEREAS, Leach Company desires the right, at its election, to buy said bonds or a part thereof and form a syndicate to dispose of the same;

NOW, THEREFORE, in consideration of the premises, the sum of One Dollar ($1.00) paid by Leach Company to Furnace Company, and other valuable considerations, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the parties hereto agree as follows:

1. The Furnace Company agrees to and hereby does give and grant unto Leach Company the right, privilege and option to purchase the whole or any part of the said issue of bonds at the price of 90 and accrued interest, and to form a syndicate to dispose of the same on such terms and conditions as Leach Company shall fix and determine.

2. The Furnace Company agrees that in the event Leach Company shall exercise its right to purchase any of said bonds and to form a syndicate to dispose thereof, that it will sell and deliver the same to Leach Company at the price of 90 and accrued interest.

3. The Furnace Company further agrees in the event that Leach Company shall exercise its option to purchase any of said bonds and form a syndicate to sell the same, that Leach Company shall pay for the first Eight Hundred Thousand Dollars ($800,000) par value of said bonds or any part at the price of 90 and accrued interest in cash upon delivery. In the event that further of said bonds are taken, Leach Company shall have the right to take and pay for any part of Four Hundred and Fifty Thousand Dollars ($450,000) par value thereof, on the following basis:

For every $1,500 par value of bonds at the price of 90 per cent and accrued interest there shall be paid ten shares of the Furnace Company's preferred stock at $85 per share and accrued dividend, the balance to be paid in cash.

The remainder of said issue of bonds, viz., Two Hundred and Fifty Thousand Dollars ($250,000), par value may be taken and paid for at the election of Leach Company at the price of 90 and accrued interest in cash upon delivery.

4. The Furnace Company agrees to furnish to Leach Company at once certified copies of earning statements approximately substantiating the figures given in Exhibit "A" hereto annexed for the years 1917 to 1921, both inclusive, also appraisals of the properties of the party of the first part, properly sworn to, substantiating the figures given in said Exhibit "A."

5. The Furnace Company agrees to submit to its stockholders and directors in due and proper form the matter of the authorization and issue of said bonds and

the giving of said mortgage to secure the same, and upon the approval thereof by said stockholders and directors to deliver to Leach Company certified copies of resolutions of its stockholders and directors authorizing said issue of bonds and the execution of the Indenture securing the same, together with a certified copy of the consent of the stockholders in respect thereto, and the opinion of its counsel as to the validity of said issue of bonds and the Indenture securing the same, and that all legal requirements have been complied with.

6. It is mutually understood and agreed between the parties hereto that if at the time of the issuance of said bonds, bonds of the same class bearing a lower rate of interest may be sold, the interest provided to be paid on said bonds may be less than eight per cent (8%), the rate of interest, however, to be left entirely to the discretion of Leach Company which shall have the right to fix the same.

7. It is mutually agreed and understood between the parties hereto that the option hereby granted unto Leach Company shall run for a period of two (2) weeks from the date of the receipt by it of the data and all papers hereinabove referred to and agreed to be so furnished by the Furnace Company.

8. Leach Company agrees, upon receipt of the papers aforesaid, to put forth its earnest efforts in an endeavor to form a syndicate to dispose of said bonds.

9. Leach Company agrees, in the event that it exercise the option aforesaid, to take and pay for the said bonds from time to time, either in cash and/or cash and stock, as provided in paragraphs 2 and 3 hereof, in the amounts as and when called for, within one hundred and twenty-five (125) days from the date of the exercise of said option by it.

10. This contract is subject to the ratification and approval of the authorization and issue of said bonds and mortgage by the stockholders and directors of the Furnace Company.

In Witness Whereof, the Furnace Company has hereunto caused this agreement to be signed in its name by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed, attested by its secretary, by order of its Board of Directors, and Leach

Company has hereunto caused the same to be signed in its name by one of its vice-presidents as of the day and year first above written.

THE STRUTHERS FURNACE COMPANY,

By W. C. RUNYON, JR.,

(Seal) *Vice Prest.*

Attest: A. GROSSMAN,

Secretary.

A. B. LEACH & COMPANY, INC.,

By H. C. ZWETSCH,

Vice President.

F. M. LAPP,

Witness.

EXHIBIT "A."

As Identified in Plaintiff's Exhibit 4.

4/4/22

$1,500,000

THE STRUTHERS FURNACE COMPANY

First Mortgage and Collateral 8% Sinking Fund Gold Bond.

Dated April 1, 1922 Due April 1, 1942

Authorized and to be outstanding $1,500,000.

Coupon bonds in denominations of $1,000 and $500, registerable as to principal. Interest payable April 1 and October 1. Redeemable in whole or in part at the option of the Company on 30 days' notice on any interest date up to and including April 1, 1925, at 110 and interest; up to and including April 1, 1930, at 107½ and interest; up to and including April 1, 1935, at 105 and interest, and thereafter at ½% less for each year elapsed.

Interest payable without deduction for the Normal Federal Income Tax not exceeding 2%. Pennsylvania Four-Mill Tax refunded upon application.

..... Trust Co., Trustee.

The following information is summarized from the accompanying letter of Mr. Walter C. Runyon, Sr., President of the Company:

Business and Properties. The business was founded in 1869 and incorporated under its present name in 1896. It has been under the same management for the past 35 years. The principal products are basic pig iron used exclusively in the production of high grade steel, and also foundry pig iron. The properties comprise 32 acres, located in one of the most important steel centers in which are situated plants of the Youngstown Sheet & Tube Company, Republic Iron & Steel Company, United States Steel Corporation and of other large steel manufacturing concerns. The equipment includes a modern blast furnace of 15,000 tons monthly capacity, a new power house and a pumping plant with a daily capacity of 18,000,000 gallons, casting machines, locomotive cranes, railroad equipment consisting of 126 steel hopper cars and switching locomotive, and a modern crushing plant for the profitable disposal of slag, a valuable blast furnace by-product. In addition the Company owns in equal partnership with the Cleveland-Cliffs Iron Company the Helmer-Wade mine containing in excess of 3,000,000 tons of iron ore.

Security. These bonds, in the opinion of counsel, will be secured by a direct first closed mortgage on the entire fixed property and equipment of the Company now owned, including the undivided one-half interest in the Helmer-Wade mines. They will be additionally secured by pledge of the entire capital stock of The Struthers Coal & Coke Company.

Valuation of Assets. Based on recent expert appraisal, the values of the fixed assets and equipment, and the interest in the Helmer-Wade mine and the equity in The Struthers Coal & Coke Company, aggregate in excess of $3,000,000, or more than twice the total amount of this issue of bonds. Net quick assets (after giving effect to the new financing) on the basis of the balance sheet prepared by Ernst & Ernst, Certified Public Accountants, as at December 31, 1921, were $1,529,442, or in excess of the total amount of this issue.

Earnings. Net profits for the five years and eight months ended December 31, 1921, after liberal depreciation charges, available for interest before Federal Taxes, averaged $367,529, or over three times the annual interest requirements on this issue of bonds, and after provision for Federal taxes such net profits averaged over $135,598. These averages include the unfavorable

year 1921, during part of which the Company did not operate. Net profits available for interest for the year 1920, before Federal taxes, were $272,004, and after Federal taxes $207,648.

SINKING FUND. The Company will set aside as a sinking fund in semi-annual installments, beginning April 1, 1925, 15% of the net earnings (after all proper deductions) for the retirement of these bonds by purchase in the market at not exceeding the then redemption price and accrued interest, or, if not so obtainable, by call by lot at the then redemption price and accrued interest.

PURPOSE OF ISSUE. The proceeds of this issue will be used for the reduction of current indebtedness, for additional working capital and for other corporate purposes.

APPRAISAL AND AUDITS. Appraisals of the building, land and equipment by Freyn, Brassert & Company of Chicago, who are among the foremost builders of blast furnaces in this country. Audit by Ernst & Ernst, Certified Public Accountants of Cleveland.

LEGALITY. All legal matters in connection with this issue, including preparation of the mortgage and bonds, supervision of the corporate action incident thereto, and other matters, are under the supervision of Messrs. Tolles, Hogsett, Ginn & Morley, of Cleveland.

PRICE: and interest, to yield ....%.

Mr. Wilson: We offer in evidence by consent of counsel for the defendant a copy of the minutes of the meeting of the stockholders of the Struthers Furnace Company on May 5, 1922, which relate to the making of a bond and a mortgage and the issuing of $1,500,000.00 bonds, and which include copies of the notice of the meeting and of the consents and proxies that were filed.

Thereupon, the document last above referred to was received in evidence as Plaintiff's Exhibit 5 and is as follows:

PLAINTIFF'S EXHIBIT NO. 5.

Minutes of Special Meeting of Stockholders of The Struthers Furnace Company.

Cleveland, Ohio, May 5th, 1922.

PURSUANT to notice duly given, according to the regulations and statutes, a special meeting of the common stockholders of the Company was held at the Company's principal office in the Citizens Building, Cleveland, Ohio, at 11 o'clock A. M., on the above date.

The President of the Company was chosen Chairman of the meeting and the Secretary of the Company was chosen Secretary of the Meeting.

The Secretary read the notice to the stockholders of the calling of the meeting, the same being as follows:

NOTICE OF SPECIAL MEETING OF STOCKHOLDERS OF THE STRUTHERS FURNACE COMPANY.

Notice is hereby given that a meeting of the stockholders of the Company will be held at the office of the Company, Number 1106 Citizens Building, Cleveland, Ohio, at 11 o'clock A. M., on the 5th day of May, 1922, to consider and act upon the authorization, issue and sale of $1,500,000.00 principal amount, of First Mortgage Sinking Fund Eight Per Cent Gold Bonds of the Company, dated May 1, 1922, maturing May 1, 1942, and the execution and delivery of a First Mortgage and Collateral Trust Indenture, covering all the real estate and fixed assets and certain other property of the Company, to secure the payment of the principal and interest of said bonds. The issue and sales of said bonds and the giving of said mortgage have been unanimously approved by the Directors of the Company.

This is enclosed herewith a form of consent and proxy which we would ask you to sign and return if you cannot be present at the meeting.

By order of the Board of Directors.

(Signed) A. GROSSMAN,
Secretary.

The Secretary then reported to the meeting that copies of said notice had been mailed to all common stockholders of the Company on April 24, 1922.

The Chairman instructed the Secretary to call the roll which disclosed that common stockholders were present in person or by proxy as follows:

Name of Stockholder	Name of Proxy	No. of Shares
W. C. Runyon	In Person	5653
W. C. Runyon, Jr.,	In Person	200
W. C. Runyon, Jr., Trustee	In Person	29
R. E. Runyon	In Person	200
A. Grossman	In Person	238
Geo. A. Coulton	In Person	50
Sarah Gage Runyon	W. C. Runyon, Jr.	294
Bernice Agnew Runyon	W. C. Runyon	265
Jules G. Richards	W. C. Runyon	221
Alice Runyon Hart	W. C. Runyon	200
Alice Runyon Hart, Trustee	W. C. Runyon	29
Wm. Chisholm Stubbs	W. C. Runyon	65
Elisha Gray Stubbs	W. C. Runyon	65
I. Dreshsler	W. C. Runyon	33
L. S. Baldwin	W. C. Runyon	6.
Total Shares Present		7548

The Secretary then reported that the preferred stockholders of the Company, owning nine thousand seven hundred forty-one (9741) shares of the preferred stock of the Company, being more than three-fourths in amount of the preferred stock outstanding, had signed and delivered to the Secretary of the Company consents and proxies in the following form:

THE STRUTHERS FURNACE COMPANY.

Consent and Proxy.

The undersigned, a stockholder of The Struthers Furnace Company, hereby waives any and all notes required by the Company regulations or by law of a special meeting of the stockholders of said Company to be held at the office of the Company, Cleveland, Ohio, on a day and time to be hereafter fixed

by the Board of Directors, for the purpose of authorizing an issue of First Mortgage Bonds of the Company in a sum not to exceed $1,500,000 par amount, the payment of said bonds to be secured by a mortgage conveying the real estate, plant and equipment of the Company.

The undersigned also appoints W. C. Runyon, W. C. Runyon, Jr., and George A. Coulton, or any one or more of them with full power in each to substitute an attorney and proxy in his place and stead, true and lawful attorneys and proxies of the undersigned to appear and to vote, consent and act in respect to all stock of said Company standing in the name of the undersigned at said special meeting of stockholders or any adjournment thereof, on any and all questions that may be presented at said meeting, hereby ratifying and confirming all acts of said proxies or substitutes.

A majority of said proxies present at said meeting or any adjournment thereof may exercise the foregoing powers, and if only one proxy is present he may exercise the powers vested in said proxies or substitutes.

The undersigned hereby also consents and agrees that said Company be and through its directors and officers may authorize, issue and dispose of any issue of bonds of the Company not to exceed $1,500,000 in total par amount, bearing interest at not exceeding 8% per annum, payable semi-annually, maturing at not exceeding twenty years from the date thereof, and secure the payment of principal and interest of said bonds by a mortgage upon the real estate, plant and equipment of the Company, said bonds and mortgage to contain such terms and conditions and said bonds to be sold at such prices and for such purposes, all as may be determined by resolutions of the Board of Directors of the Company.

Witness the name of the undersigned April ..... 1922.

.....

Signed in presence of:

.....

There was then presented to the meeting the minutes of a special meeting of the Directors of the Company held this day prior to the stockholders' meeting and the same were read.

There was also presented to the meeting printed form of the first mortgage trust deed referred to in the minutes of the Directors' meeting. After discussion, on motion duly made by Geo. A. Coulton, seconded by R. E. Runyon, and carried by the affirmative votes of the common and preferred stockholders present at the meeting, there was passed a resolution in the following words and figures, to-wit:

WHEREAS, this Company is authorized by law to borrow money and contract debts for any purpose of its incorporation and to issue and dispose of its bonds or other obligations therefor and to secure the payment of said bonds or other obligations and the amount so borrowed by mortgage upon its property and franchises; and

WHEREAS, preferred stockholders of the Company, owning more than three-fourths in amount of the preferred stock outstanding, have assented in writing to the making of the first mortgage trust deed and to the issuance of the bonds hereinafter mentioned; and

WHEREAS, the Company owes the property described and referred to in the first mortgage trust deed hereinafter mentioned.

NOW, THEREFORE, BE IT RESOLVED, That the action of the Board of Directors of the Company this day had authorizing the execution and sale of first mortgage sinking fund eight per cent (8%) gold bonds of the Company in the total par amount of One Million Five Hundred Thousand Dollars ($1,500,000), dated May 1, 1922, being numbered and for the respective amounts as set forth in the form of said bonds, and the said execution and sale of said bonds by this Company, be and the same is hereby ratified, approved and confirmed by the stockholders of this Company.

BE IT FURTHER RESOLVED, that the payment of said bonds and the interest thereon shall be secured by a first mortgage trust deed from this Company to The Guardian Savings and Trust Company (of

Cleveland, Ohio,) as Trustee, covering, conveying and pledging to said Trustee all right, title and interest of the Company in and to the property, real and personal, of the Company mentioned and described in the first mortgage trust deed presented to this meeting, together with the income, rents, issues and profits of said property and property of the Company hereinafter acquired, all as set forth and according to all the terms and conditions in said first mortgage trust deed; and

Be It Further Resolved, that said first mortgage trust deed shall be in the form as authorized by said Board of Directors and as presented to this meeting and hereby ratified and approved, and that the same shall be signed on behalf of the Company by the President or Vice President of the Company and the corporate seal thereto affixed, attested by the Secretary or the Assistant Secretary of the Company and their signatures thereto shall be conclusive evidence as to the approval by the preferred and common stockholders of the Company of the form and substance of said first mortgage trust deed.

Motion unanimously carried.

The meeting adjourned.

A. Grossman,
Secretary.

April 24, 1922.

Notice of Special Meeting of Stockholders
of
The Struthers Furnace Company.

Notice is hereby given that a meeting of the stockholders of the Company will be held at the office of the Company Number 1106 Citizens Building, Cleveland, Ohio, at 11 o'clock A. M. on the 5th day of May, 1922, to consider and act upon the authorization, issue and sale of $1,500,000.00 principal amount, of First Mortgage Sinking Fund Eight Percent Gold Bonds of the Company, dated May 1, 1922, maturing May 1, 1942, and the execution and delivery of a First Mortgage and Collateral Trust Indenture, covering all the real estate and fixed assets and certain other property of the Company, to secure the payment of the principal and interest of

said bonds. The issue and sale of said bonds and the giving of said mortgage have been unanimously approved by the Directors of the Company.

This is enclosed herewith a form of consent and proxy which we would ask you to sign and return if you cannot be present at the meeting.

By order of the Board of Directors.

A. GROSSMAN,
Secretary.

THE STRUTHERS FURNACE COMPANY.

Consent and Proxy.

The undersigned, a stockholder of The Struthers Furnace Company, hereby waives any and all notice required by the Company regulations or by law of a special meeting of the stockholders of said Company to be held at the office of the Company, Cleveland, Ohio, on Friday, May 5th, 1922, at 11 A. M., for the purpose of authorizing an issue of First Mortgage Bonds of the Company in a sum not to exceed $1,500,000 par amount, the payment of said Bonds to be secured by a mortgage conveying the real estate, plant and equipment of the Company.

The undersigned also appoints W. C. Runyon, W. C. Runyon, Jr., and George A. Coulton, or any one or more of them with full power in each to substitute an attorney and proxy in his place and stead, true and lawful attorney and proxies of the undersigned to appear and to vote, consent and act in respect to all stock of said Company standing in the name of the undersigned at a said special meeting of stockholders or any adjournment thereof, on any and all questions that may be presented at said meeting, hereby ratifying and confirming all acts of said proxies and substitutes.

A majority of said proxies present at said meeting or any adjournment thereof may exercise the foregoing powers, and if only one proxy is present he may exercise the powers vested in said proxies.

The undersigned hereby also consents and agrees that said Company by and through its directors and officers may authorize, issue and dispose of any issue of bonds of the Company not to exceed $1,500,000.00 in total par amount bearing interest at not exceeding 8%

per annum, payable semi-annually, maturing at not exceeding twenty years from the date thereof, and secure the payment of principal and interest of said bonds by a mortgage upon the real estate, plant and equipment of the Company, said bonds and mortgage to contain such terms and conditions and said bonds to be sold at such prices and for such purposes, all as may be determined by resolutions of the Board of Directors of the Company.

WITNESS the name of the Undersigned, April ...., 1922.

.....

Signed in presence of:

.....

Cleveland, Ohio, May 5, 1922.

I, A. Grossman, Secretary of The Struthers Furnace Company, do hereby certify that at a special meeting of the common stockholders of said Company, duly called and held at the office of the Company, Citizens Building, Cleveland, Ohio, on the above date, notice of the time, place and objects of which meeting was duly given according to the regulations of the Company and the statutes, and at which meeting there was present in person or by proxy more than a majority of the outstanding common stock of the Company, there was duly and legally passed by the vote of all the common stock present a resolution in the following words and figures, to-wit:

WHEREAS, this Company is authorized by law to borrow money and contract debts for any purpose of its incorporation and to issue and dispose of its bonds or other obligations therefor and to secure the payment of said bonds or other obligations and the amount so borrowed by mortgage upon its property and franchises; and

WHEREAS, preferred stockholders of the Company owning more than three-fourths in amount of the preferred stock outstanding, have assented in writing to the making of the first mortgage trust deed and to the issuance of the bonds hereinafter mentioned; and

WHEREAS, the Company owns the property described and referred to in the first mortgage trust deed hereinafter mentioned.

NOW, THEREFORE, BE IT RESOLVED, that the action of the Board of Directors of the Company this day had authorizing the execution and sale of first mortgage sinking fund eight per cent (8%) gold bonds of the Company in the total par amount of One Million Five Hundred Thousand Dollars ($1,500,000.00), dated May 1, 1922, bearing interest at the rate of eight per cent (8%) per annum payable semi-annually maturing May 1, 1942, being numbered and for the respective amounts as set forth in the form of said bonds, and the said execution and sale of said bonds by this Company, be and the same is hereby ratified, approved and confirmed by the stockholders of this Company.

BE IT FURTHER RESOLVED, that the payment of said bonds and the interest thereon shall be secured by a first mortgage trust deed from this Company to The Guardian Savings and Trust Company (of Cleveland, Ohio) as Trustee, covering, conveying and pledging to said Trustee all right, title and interest of the Company in and to the property, real and personal, of the Company mentioned and described in the first mortgage trust deed presented to this meeting, together with the income, rents, issues and profits of said property and property of the Company hereinafter acquired, all as set forth and according to all the terms and conditions in said first mortgage trust deed; and

BE IT FURTHER RESOLVED, that said first mortgage trust deed shall be in the form as authorized by said Board of Directors and as presented to this meeting and hereby ratified and approved, and that the same shall be signed on behalf of the Company by the President or Vice President of the Company and the corporate seal thereto affixed, attested by the Secretary or the Assistant Secretary of the Company, and their signatures thereto shall be conclusive evidence as to the approval by the preferred and common stockholders of the Company of the form and substance of said first mortgage trust deed.

I further certify that stockholders owning more than three-fourths in amount of preferred stock outstanding have assented in writing to the making of said first mortgage trust deed and the issuance of said bonds.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Company to be affixed at Cleveland, Ohio, May 18th, 1922.

....., *Secretary.*

Special Meeting of Directors
of
The Struthers Furnace Company.

June 5th, 1922.

Minutes of special meeting of Directors of The Struthers Furnace Company held at 1115 Borden Bldg., New York on Monday, June 5th, at 11:30 o'clock A. M.

Present W. C. Runyon, W. C. Runyon, Jr. and A. Grossman.

President W. C. Runyon called the meeting to order, and A. Grossman, Secretary kept the Minutes.

The President reported that the meeting was called for the purpose of considering the opening of a banking account for the Company with the Seaboard National Bank (Uptown Branch) New York City, in the name and for the use of the Company.

The following Resolution was offered by W. C. Runyon, Jr. and after being duly seconded and put to a vote, was unanimously carried; "Resolved," that A. Grossman, Treasurer of this Company be, and hereby is instructed and empowered to open and keep an account of deposit and discount with the Seaboard National Bank (Uptown Branch) of New York City, in the name and for the use of the Struthers Furnace Company, to deposit in said bank to the credit of this Company from time to time, any and all moneys, checks, drafts, notes, acceptances or other evidences of indebtedness (whether belonging to this Company or otherwise) which may be or may hereafter come into its possession. Said Bank is hereby authorized to make payments from the funds of the Company on deposit with it upon and according to the check of the Company signed by W. C. Runyon,

President, A. Grossman, Treasurer, or R. H. Domer, Assistant Treasurer, and countersigned by W. C. Runyon, President, W. C. Runyon, Jr., Vice President, or R. H. Domer, Assistant Secretary. In every case, all checks of the Company to be signed and countersigned by two different officers of the Company. All notes of the Company to be signed by the Treasurer and countersigned by the President or Vice President.

The President also reported that a Resolution was in order to authorize the officers of the Company to rent a safe deposit box in the vaults of the Equitable Safe Deposit Company of New York for the safekeeping of valuable documents.

The Following Resolution was offered by W. C. Runyon, Jr., and after being duly seconded and put to vote, was unanimously carried; "RESOLVED," that the officers be and hereby are authorized to rent a safe deposit box in the vaults of the Equitable Safe Deposit Company of New York for the safekeeping of valuable papers and documents, and that access to the safe (No. 376) standing in the name of the Company in the vaults of the Equitable Safe Deposit Company of New York shall be, subject to the rules and regulations of the said Safe Deposit Company by any two of the following named officers.

W. C. Runyon, Jr. Vice President
A. Grossman Treasurer
R. H. Domer Asst. Treasurer."

There being no further business to come before the Board, the meeting adjourned.

A. GROSSMAN,
Secretary.

Mr. Wilson: By consent of counsel for defendant, we also offer in evidence minutes of a meeting of the Board of Directors held on May 5, 1922, authorizing the issue of bonds and the making of a mortgage for $1,500,000.00.

The document last above mentioned was thereupon received in evidence as Plaintiff's Exhibit 6 and is as follows:

PLAINTIFF'S EXHIBIT NO. 6.

Special Meeting of Directors of The Struthers Furnace Company.

Cleveland, Ohio, May 5th, 1922.

Pursuant to notice given according to the regulations, a special meeting of Directors of the Company was held at the Company's office, Citizens Building, Cleveland, Ohio, at ten o'clock a. m., on the above date, Directors being present as follows:

W. C. Runyon—W. C. Runyon, Jr.,—R. E. Runyon Geo. A. Coulton—and A. Grossman.

The President presided and the Secretary kept the minutes.

The Chairman stated that for some time past negotiations had been had for the sale of an issue of first mortgage bonds of the Company in total principal amount of $1,500,000 and that said negotiations had been completed and he presented to the meeting a form of first mortgage trust deed for the purpose of securing the payment of the principal and interest of said bonds.

The Secretary then stated that stockholders owning nine thousand seven hundred forty-one (9741) shares of the preferred stock of the Company, being more than three-fourths in amount of the preferred stock outstanding, had assented in writing to the issuance of bonds and the making of a mortgage to secure the same as hereinabove set forth and said assents were presented to the meeting and were ordered preserved in the Company's files.

The mortgage trust deed was read and considered and there was introduced by Geo. A. Coulton, a resolution in the following words and figures, to-wit:

> WHEREAS, this Company is authorized by law to borrow money and contract debts for any purpose of its incorporation and to issue and dispose of its bonds or other obligations therefor and to secure the payment of said bonds or other obligations and the amount so borrowed by mortgage upon its property and franchises; and
>
> WHEREAS, preferred stockholders of the Company, owning more than three-fourths in amount of the preferred stock outstanding, have assented in

writing to the making of the first mortgage trust deed and to the issuance of the bonds hereinafter mentioned; and

WHEREAS, the Company owns the property described and referred to in the first mortgage trust deed hereinafter mentioned,

NOW, THEREFORE, BE IT RESOLVED, that the President or Vice-President and Secretary or Assistant Secretary of the Company be and they are hereby authorized and directed to make, execute and sell the first mortgage sinking fund eight per cent (8%) gold bonds of the Company in the total par amount of one million five hundred thousand dollars ($1,500,000), dated May 1st, 1922, to be payable May 1, 1942, in gold coin of the United States of America of or equal to the present standard of weight and fineness, to bear interest at the rate of eight per cent (8%) per annum, payable semi-annually on the first day of May and November in each year from the date thereof until paid in the gold coin aforesaid, evidenced by coupons attached to said bonds executed by the facsimile of the signature of the Treasurer of the Company, both principal and interest to be payable at the principal office of The Guardian Savings and Trust Company, in the City of Cleveland, Ohio, which bonds, subject to the necessary variations in the distinguishing characteristics thereof, shall be substantially as follows:

(FORM OF BOND)

BE IT FURTHER RESOLVED, that to secure the prompt and punctual payment of the principal and interest of said bonds the President or Vice President, and Secretary or Assistant Secretary of the Company are hereby authorized and directed to execute, acknowledge and deliver to The Guardian Savings and Trust Company (of Cleveland, Ohio), as Trustee, a first mortgage trust deed covering, conveying and pledging to said Trustee in trust all right, title and interest of the Company in and to the real and personal property of the Company mentioned and described in the first mortgage trust deed presented to this meeting, together with the income, rents, issues and profits of said property and property of the Company hereinafter acquired, all

as set forth and according to all the terms and conditions in said first mortgage trust deed; and

BE IT FURTHER RESOLVED, that said first mortgage trust deed shall be in the form this day presented to this meeting and hereby ratified and approved and that the same shall be signed on behalf of the Company by the President or Vice President of the Company, and the corporate seal thereto affixed, attested by the Secretary or Assistant Secretary of the Company, and their signatures thereto shall be conclusive evidence as to the approval by the Board of Directors of the Company of the form and substance of the first mortgage trust deed.

Director W. C. Runyon, Jr., seconded said resolution and a vote was thereupon had, Directors voting as follows:

Director W. C. Runyon—Aye.
Director W. C. Runyon, Jr.—Aye.
Director R. E. Runyon—Aye.
Director Geo. A. Coulton—Aye.
Director A. Grossman—Aye.

The Chairman thereupon declared the resolution carried.

There was then presented to the meeting a contract between the Company and A. B. Leach & Company, Inc., dated April 15th, 1922, with subsequent modifications covering the sale of the bonds above authorized. Said contract was considered and upon motion duly made, seconded and carried, was unanimously approved.

The meeting adjourned.

A. GROSSMAN,
Secretary.

(FORM OF BOND)

No. ..... $.....

UNITED STATES OF AMERICA

THE STRUTHERS FURNACE COMPANY

First Mortgage Sinking Fund Eight Per Cent. Gold Bond

Total Issue $1,500,000.

THE STRUTHERS FURNACE COMPANY, a corporation of the State of Ohio (herein called the Company), for

value received, promises to pay to the bearer, or if registered to the registered holder hereof,
Dollars in gold coin of the United States of America of or equal to the present standard of weight and fineness, on May 1, 1942, and to pay interest thereon from May 1, 1922, until the principal sum is paid at the rate of Eight Per Cent (8%) per annum, payable semi-annually on the first day of May and the first day of November in each year, in like gold coin, on presentation and surrender of the coupons hereto annexed as the same severally mature, both principal and interest being payable at the principal office of The Guardian Savings and Trust Company (herein called the Trustee) in the City of Cleveland, Ohio, or at the option of said bearer or such holder at the office or agency of the Company in the City of Chicago, Illinois, and in the Borough of Manhattan in the City and State of New York.

This bond is one of a duly authorized issue of bonds of the Company, known as its First Mortgage Sinking Fund Eight Per Cent. Gold Bonds, (herein called the Bonds) dated May 1, 1922, limited to the principal amount of One Million Five Hundred Thousand Dollars ($1,500,000) at any one time outstanding, consisting of bonds numbered consecutively from M1 upwards, of the principal sum of One Thousand Dollars ($1,000) each, bonds numbered consecutively from D1 upwards, of the principal sum of Five Hundred Dollars ($500) each, and bonds numbered consecutively from C1 upwards, of the principal sum of One Hundred Dollars ($100) each. All of said bonds shall mature and become payable May 1, 1942, and are issued or to be issued by the Company pursuant to, under and in accordance with and are equally and ratably secured by a First Mortgage Trust Deed (herein called the Mortgage) dated May 1, 1922, duly executed and delivered by the Company to The Guardian Savings and Trust Company as Trustee, and filed for record in the office of the County Recorder of Mahoning County, Ohio, in which County the principal real estate and property of the Company thereby mortgaged is situated, to which Mortgage reference is hereby made for a description of the property thereby mortgaged, conveyed and pledged or assigned, the nature and extent of the security and the nature of the terms and conditions on which said Bonds are issued or to be issued and secured and the rights of the holders in respect thereof.

The interest on this Bond is payable without deduction for any Federal Income tax or taxes (except the excess, if any, of any such income tax or taxes over an aggregate in any cne year of Two per cent (2%) of the interest payable hereon) which the Company or the Trustee may be permitted or required to pay or retain therefrom under any present or future law. As provided in the Mortgage the Company will reimburse to the bearer, or if registered, to the registered holder hereof, any Pennsylvania personal property tax not exceeding four mills per annum of each dollar of the principal amount hereof which may be legally assessed upon this Bond or upon such bearer or registered holder by reason of his ownership hereof and paid by him, if application therefor be made by him as provided in the Mortgage.

The Bonds of this issue on and after May 1, 1925, are subject to redemption on any interest payment date at the option of the Company at par and a premium of seven and one-half per cent (7½%) and accrued interest up to and including May 1, 1930, and thereafter at par and a premium of five per cent (5%) and accrued interest up to and including May 1, 1935, and thereafter at par and a premium of five per cent (5%) less one-half per cent (½%) for and in respect to each twelve month period elapsed from and after May 1, 1935, and accrued interest upon thirty (30) days' notice and according to the terms and in the manner and with the effect provided in the Mortgage.

This Bond, beginning with April 1, 1925, is entitled to the benefits of a sinking fund to be created by the Company upon the terms and conditions set forth in the Mortgage.

This Bond shall pass by delivery unless registered in the owner's name on the books of the Company at the principal office of the Trustee in the City of Cleveland, Ohio, such registration being noted hereon as provided in the Mortgage. After such registration no transfer shall be valid unless made on the said books by the registered holder in person or by attorney, duly authorized, and similarly noted hereon; but this Bond may be discharged from registry by being in like manner transferred to the bearer and thereupon transferability by delivery shall be restored and this Bond may again, from time to time, be registered or transferred to bearer as before. Such registration shall not affect the negotia-

bility of the coupons which shall continue to be transferable by delivery. In case an event of default as defined in the Mortgage shall occur, the principal of all of said Bonds may become or be declared due and payable in the manner and with the effect provided in the Mortgage.

The holder of this Bond by the acceptance hereof agrees that no recourse shall be had for the payment of the principal or interest hereof against any incorporator, stockholder, officer or director of the Company, whether by virtue of any law or by the enforcement of any assessment, it being agreed that the Bonds are solely corporate obligations of the Company and no personal liability shall attach to incorporators, stockholders, officers or directors of the Company, any and all such personal liability being hereby expressly waived.

This bond and the coupons pertaining hereto shall not be entitled to any benefit under the Mortgage or become valid or obligatory for any purpose until it shall have been authenticated by the certificate of the Trustee under the Mortgage hereon endorsed.

IN WITNESS WHEREOF, The Struthers Furnace Company has caused this Bond to be signed by its President or a Vice President and its corporate seal to be hereunto affixed and attested by its Secretary or an Assistant Secretary, and coupons for said interest bearing the facsimile signature of its Treasurer to be attached hereto, all in the City of Cleveland, State of Ohio, as of May 1, 1922.

THE STRUTHERS FURNACE COMPANY,

By .....
President.

Attest: .....
Secretary.

(FORM OF COUPON)

No. ..... $.....

On ....., 19..., unless the Bond hereinafter mentioned shall have been previously redeemed The Struthers Furnace Company will pay to the bearer at the principal office of The Guardian Savings and Trust Company in the City of Cleveland, Ohio, or at the option of the bearer at the office or agency of The Struthers

Furnace Company in the City of Chicago, Illinois, and in the Borough of Manhattan in the City and State of New York, on the surrender of this coupon ..... Dollars in United States gold coin, being six months' interest then due on its First Mortgage Sinking Fund Eight Per Cent. Gold Bond No. .....

.....

Treasurer.

(Form of Trustee's Certificate)

This is one of the Bonds described in the within mentioned Mortgage.

The Guardian Savings and Trust Company, Trustee,

By .....

Vice President.

(Registration)

Notice: Nothing can be written on this Bond except by the officers of The Guardian Savings and Trust Company, Trustee, or its successor in Trust, as Registrar without impairing its negotiability.

Date of Registry	In Whose Name Registered	Registrar
.....	.....	.....
.....	.....	.....
.....	.....	.....

Cleveland, Ohio. May 5, 1922.

I, A. Grossman, Secretary of The Struthers Furnace Company, do hereby certify that at a special meeting of the Board of Directors of said Company, duly called and held at the office of the Company, Citizens Bank, Cleveland, Ohio, on the above date, at which there was present and voting more than a majority of said Board of Directors, there was duly and legally passed by the yea and nay vote of the Directors a resolution in the following words and figures, to-wit:

Whereas, this Company is authorized by the law to borrow money and contract debts for any purpose of its incorporation and to issue and dispose

of its bonds or other obligations therefor and to secure the payment of said bonds or other obligations and the amount so borrowed by mortgage upon its property and franchises; and

WHEREAS, preferred stockholders of the Company, owning more than three-fourths in amount of the preferred stock outstanding, have assented in writing to the making of the first mortgage trust deed and to the issuance of the bonds hereinafter mentioned; and

WHEREAS, the Company owns the property described and referred to in the first mortgage trust deed hereinafter mentioned,

NOW, THEREFORE, BE IT RESOLVED, that the President or Vice-President and Secretary or Assistant Secretary of the Company be and they are hereby authorized and directed to make, execute and sell the first mortgage sinking fund eight per cent. (8%) gold bonds of the Company in the total par amount of One Million Five Hundred Thousand Dollars ($1,500,000), dated May 1, 1922, to be payable May 1, 1942, in gold coin of the United States of America of or equal to the present standard of weight and fineness, to bear interest at the rate of eight per cent. (8%) per annum, payable semi-annually on the first day of May and November in each year from the date thereof until paid in the gold coin aforesaid, evidenced by coupons attached to said bonds executed by the facsimile of the signature of the Treasurer of the Company, both principal and interest to be payable at the principal office of The Guardian Savings and Trust Company, in the City of Cleveland, Ohio, which bonds, subject to the necessary variations in the distinguishing characteristics thereof, shall be substantially as follows:

(INSERT HERE FORM OF BOND)

(See page 69)

BE IT FURTHER RESOLVED, that to secure the prompt and punctual payment of the principal and interest of said bonds the President or Vice President, and Secretary or Assistant Secretary of the Company, are hereby authorized and directed to execute, acknowledge and deliver to The Guardian

Savings and Trust Company (of Cleveland, Ohio), as Trustee, a first mortgage trust deed covering, conveying and pledging to said Trustee in trust all right, title and interest of the Company mentioned and described in the first mortgage trust deed presented to this meeting, together with the income, rents, issues and profits of said property and property of the Company hereinafter acquired, all as set forth and according to all the terms and conditions in said first mortgage trust deed; and

Be It Further Resolved, that said first mortgage trust deed shall be in the form this day presented to this meeting and hereby ratified and approved and that the same shall be signed on behalf of the Company by the President or Vice President of the Company, and the corporate seal thereto affixed, attested by the Secretary or Assistant Secretary of the Company, and their signatures thereto shall be conclusive evidence as to the approval by the Board of Directors of the Company of the form and substance of the First Mortgage trust deed,

In Witness Whereof, I have hereunto set my hand and caused the seal of the Company to be affixed at Cleveland, Ohio, May 19, 1922.

A. Grossman,
Secretary.

A. B. Leach & Company,
Investment Securities

New York.

62 Cedar St.,
New York,
April 27, 1922.

Struthers Furnace Company,
Cleveland, Ohio.

Dear Sirs:

We wish to confirm telephone conversation held with Mr. Walter C. Runyon, Sr., President of your Company, whereby the Sinking Fund of the proposed issue of $1,500,000 Struthers Furnace Company 1st Mortgage & Collateral 8% Sinking Fund Gold Bonds will call for the payment of 25% of the net earnings of the Company after all proper deductions are made instead of the 15% of the net earnings as previously agreed upon.

Therefore the price at which we are to take up such bonds as we exercise our option on is to be at the price of 90½% instead of 90%. Other provisions of said contract to remain in full force and effect.

We would thank you to kindly confirm the understanding and beg to remain

Very truly yours,

CB.AS A. B. LEACH & Co., INC.

(Here follows copy of contract of April 15, 1922, between the Struthers Furnace Company and A. B. Leach & Co., Inc. with respect to purchase of bonds of the former by the latter, and attached memoranda, both of which appear on pages 51 to 53 *supra*.)

Mr. Wilson: We offer in evidence the certificate filed by Tillotson and Wolcott Company and A. B. Leach & Company, Inc. filed with the Division of Securities of the Department of Commerce of Ohio, dated May 9, 1922, and a copy of the letter of exemption of the bonds under the law of the State of Ohio.

Thereupon, the documents last above mentioned were received in evidence as Plaintiff's Exhibits 7a and 7b respectively and are as follows:

PLAINTIFF'S EXHIBIT NO. 7-A.

Certificate.

STATE OF OHIO
DEPARTMENT OF COMMERCE
COLUMBUS

DIVISION OF SECURITIES
Norman E. Beck
Chief of Division
Bryan Cooper
Asst. Chief of Division

February 8, 1926.

TO WHOM IT MAY CONCERN:

This is to certify that the attached is a true and correct copy of the form No. 4 filed by A. B. Leach and Company under date of May 9, 1922 and also a true and correct copy of our letter of exemption qualifying $1,-

500,000.00 Gold Bonds of the Struthers Furnace Company.

(Seal) (Signed) BRYAN COOPER.

Address All Communications to Division of Securities, Columbus, Ohio.

PLAINTIFF'S EXHIBIT NO. 7-B.

Form No. 4 and Letter of Exemption of Bonds.

STATE OF OHIO
DEPARTMENT OF COMMERCE
DIVISION OF SECURITIES

FORM No. 4.

(Sec. 6373-9 10 and 14)

The statement and information herein set forth is directed to the Chief of Division of Securities of the State of Ohio, under the Act passed by the Legislature of the State of Ohio, on the 28th day of April, 1913, as amended February 6, 1914, as amended May 20, 1915, as amended March 21, 1917, as amended May 17, 1921, and as amended April 30, 1923, entitled "An Act to regulate the sale of stocks bonds, etc., etc., concerning the securities of (1) The Struthers Furnace Company, a corporation, ...
Organized under the laws of .....
Said securities are (2) $1,500,000.00 First Mortgage Sinking Fund 8% Gold Bonds .....

1—Has the issuance of these securities been approved by the public service commission or like body of any state of the United States or any Province of the Dominion of Canada?.....
If so, where? .....

2—Is the disposal to be made by or on behalf of an underwriter who, in good faith and not for the purpose of avoiding the provisions of this Act, purchased the securities paying therefor in cash or its equivalent, before any attempt is made to dispose of them, not less than ninety per centum of the price at which the securities will be disposed of? Yes.

3—Are the securities those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, coal mining or

quarrying, and is the whole or a part of the property upon which such securities are predicated within this state and is such company an actual going concern having been engaged in its principal business for a period of one year or more and having no obligations which are past due and unpaid? Yes.

4—Are the securities those of a real estate or building company and is all of the property upon which such securities are predicated, located in Ohio? .....

5—Has the information regarding these securities, required on pages 2 and 3, been filed by any other licensee? If so, by whom?

6—Have actual current sales of these securities at prices quoted, been, from time to time, for not less than one year next preceding this disposal, published in the tabulated market reports of the news columns of a daily newspaper published and of general circulation in this State? .....

7—Is the disposal to be made for a commission of less than one per centum of the par value thereof, by a licensee who is a member of a regularly organized stock exchange having an established and lawfully conducted place of business in this state, regularly open for public patronage as such? .....

8—Are the securities those of a taxing subdivision of any state, territory, province or foreign government, and the obligation of the entire taxing subdivision payable out of the proceeds of a general tax? .....

The above statements are true to the best of ..... knowledge and belief and are made for the guidance of the Chief of Division

(3) TILLOTSON AND WOLCOTT CO.
(Signed) JULIAN W. TYLER, *Secretary.*
(Sign Here) A. B. LEACH AND COMPANY, INC.
(Signed) H. L. ZINTSCH (?)
Vice Pres.

(1)—Insert the name and location of Issuer.

(2)—State kind and amount of the issue and selling price.

(3)—Signature of license dealer.

The information set forth in the following statement of facts is made to the Chief of Division under an act of the Legislature of Ohio passed April 28, 1913, entitled: "An act to regulate the sale of bonds, stocks, and other securities and of real estate not located in Ohio, and to prevent fraud in such sales," as amended February 6, 1914, as amended May 20, 1915, as amended March 21, 1917, as amended May 17, 1921, and as amended April 30, 1923. To the Chief of Division of Securities:

The name of the issuer is The Struthers Furnace Company Organized under laws of .....
The principal office is located at Cleveland, Union Trust Building, State of Ohio.

The names of the officers, directors or partners are:

W. C. Runyon, President
W. C. Runyon, Jr. Vice President
A. Grossman, Secretary

DIRECTORS

W. C. Runyon
W. C. Runyon, Jr.
A. Grossman
G. A. Coulton
R. E. Runyon.

The following statement in general detail, correctly exhibits the resources and liabilities, surplus and capital stock of the issuer, as of a date as late as the close of the last fiscal year, and of its gross income, expenses, net earnings and fixed charges, for one year last prior thereto, or for such time as the issuer has been in business if less than one year.

Resources.	Dollars	Cts	Liabilities	Dollars	Cts.
Bills receivable,			Capital paid up		
Real estate,			Surplus		
Personal property,			Undivided profits,		
Stocks, bonds and other securities,			Bills payable,		
Merchandise			Accounts payable		
Cash on hand,			Bonded indebtedness,		
Due from banks,			Encumbrance on real estate or plant,		
Accounts receivable,					
Judgments,					
Total			Total		

The following is a pertinent description of the securities and the purpose of the issue. The securities within described are to be issued for the purpose of refunding corporate indebtedness and provide capital and for other corporate purposes.

State of Ohio
Cuyahoga, ss.

I, W. C. Runyon, President, and I, A. Grossman, Secretary, of the above-named corporation, do solemnly swear that the above is a full and complete statement of the resources and liabilities of said corporation as shown by the books of the same, and that said statement and the several matters and things contained in this statement are true in every particular, to the best of my knowledge and belief.

(signed) W. C. Runyon,
President.

(signed) A. Grossman,
Secretary.

Subscribed and sworn to before me, this 6th day of May, A. D. 1922.

(signed) Frank H. Lunn,
(Seal) *Notary Public.*

(My commission expires ..... 192...)

Balance Sheet
of
The Struthers Furnace Company,
Cleveland, Ohio.
At the Close of Business December 31, 1921.

Assets

Cash on hand	2,939.20
U. S. Government Securities and War Saving Stamps	49,096.97
Accounts receivable-customers	41,020.48
Inventory	1,397,819.97
Life insurance cash surrender value	29,350.00

Railroad equipment less allowance for depreciation	330,518.34	
Personal and miscellaneous accounts receivable, etc.	153,184.76	
Investments, Struthers Coal and Coke Company stock and interest in ore mines	653,347.39	
Real estate, furnace plant and equipment, etc. less allowance for depreciation	1,035,879.57	
Deferred	132,245.79	
		$3,825,402.47
LIABILITIES		
Notes and accounts payable accrued taxes, etc.	1,085,784.44	
Open account, Struthers Coal and Coke Company	268,680.72	
Reserves for contingencies, etc.	138,686.78	
Capital stock	2,250,000.00	
Surplus	82,250.53	
		$3,825,402.47

COPY

May 9, 1922.

In Re: Struthers Furnace Company

Gentlemen:

We acknowledge receipt of the application of the Tillotson and Wolcott Company and A. B. Leach and Company, Inc., for the exemption of $1,500,000.00 First Mortgage Sinking Fund 8% Gold Bonds of the above named company, a company organized and existing under and by virtue of the laws of the State of Ohio.

The application is made under the provision of 6373-14 (e) upon the grounds that disposal is to be made by or on behalf of an underwriter who in good faith and not for the purpose of avoiding the provisions of this act, purchased the securities paying therefor in cash or its equivalent before any attempt is made to dispose

of them, not less than ninety percentum of the price at which the securities will be disposed of, and that the securities are those of a common carrier or of a company organized under the laws of this state to engage principally in the business of manufacturing, transportation, coal mining or quarrying and the whole or a part of the property upon which such securities are predicated is located within this state.

This application is correct as to form, conforms to the law and has been placed on file with this Division.

Yours very truly,

A. L. STEWART,
Chief of Division.

Per

HSM:ED *Exemption Clerk*

Tolles, Hogsett, Ginn & Morley,
12th Floor Williamson Building,
Cleveland, Ohio.

Thereupon, the plaintiff called as a witness WALTER C. RUNYON who, being first duly sworn, testified as follows on DIRECT EXAMINATION by Mr. Wilson:

My name is Walter Clark Runyon. I was the President of the Struthers Furnace Company before it was put into the hands of a receiver. I have never retired from that office. I was President prior, during and subsequent to the years 1921 and 1922 and also a large stockholder of the company. The purpose of the company's negotiating a bond and mortgage on its property was to pay its loans. We were then indebted to creditors and to the banks. I personally opened negotiations with the representatives of Leach & Company for the handling of the bond issue on the company's property. The negotiations began, I think, in the Fall of 1921. We were not able to get together for a loan at that time.

Q. What proposals were made by you and what proposals were made by them at that time?

Mr. Johnston: We will object to that, if the Court please. We are dealing with a written contract in this case, and proposals leading up to a making of a definite contract would be incompetent.

The Court: Yes. I don't know that that would be a good ground of objection, considering the nature of the action we have here. Objection to the question as it now stands will be sustained.

The Witness: Our negotiations in the Fall of 1921 were with Mr. Zwetsch, who was the Vice President and Cleveland representative of A. B. Leach & Company, Inc. The negotiations at that time were oral.

Q. You may go on now and state what conversations you had with Mr. Zwetsch at that time with reference to the negotiation of a bond issue or the handling of a bond issue by Leach and Company?

Mr. Johnston: I desire to renew my objection, if the Court please. That it is an attempt to modify the terms of the written contract by inserting some provision not in the nature—

Mr. Wilson: Oh, no.

The Court: It is not necessary to argue an objection to evidence until the Court invites it. The objection will be overruled and exception allowed and the testimony will be received. It may or may not be material. By that I mean that it may not add anything to the plaintiff's case as he claims it.

The Witness: Our negotiations took place in Cleveland. They were partly between my son, who was Vice President of the company, and Mr. Zwetsch, and partly between Mr. Zwetsch and me. I was not always present when negotiations were had between Mr. Zwetsch and my son. We dropped the matter in 1921 because the terms and conditions were not satisfactory to us.

Negotiations were resumed in the Spring of 1922, during the month of March or April. They were had with Mr. Zwetsch and with Mr. Campbell and Mr. Leach. Mr. Campbell is one of the Vice Presidents of A. B. Leach & Company, Inc. I had conversations with both of those gentlemen in New York. Mr. Leach is the President of the company. Those conversations were had in the office of A. B. Leach & Company, Inc., 62 Cedar Street, New York City.

Q. I wish you would give to the Court, as nearly as you can recollect, the substance of your conversation with them relating to the terms and conditions of the making of this option contract?

Mr. Johnston: It will not be necessary for us to renew our objection?

The Court: No, I will receive it, not for the purpose of modifying the terms and conditions of the written agreement afterward entered into, but for the light, if any, it may throw on the knowledge, motive or anything of the contracting parties. That may become quite material or it may remain immaterial; I don't know; but I think it is best to try the case just as I have indicated. (To the witness) The request is, Mr. Runyon, when you give conversations, or the substance of them, that you give the persons present and the persons who made the observations. Of course if they were all one conversation and all with one person, that is something different.

The Witness: Your Honor, the negotiations, I don't know as I can give you any definite date. As to the first negotiations, they were conducted generally, I might say by my son with Mr. Zwetsch, who was the Cleveland representative, and then submitted to me.

The Court: That was in the fall of 1921?

The Witness: In the fall of 1921.

The Court: And they were rejected because you didn't like the terms?

The Witness: Yes, sir.

The Court: Now you are down when you took up the negotiations in the spring of 1922. Approximately when was that?

The Witness: I would say perhaps in April.

The Court: And in what way were they reopened, with whom and by whom?

The Witness: The subject was broached probably first here to Mr. Zwetsch and then my son came from New York and with me we went to the office of A. B. Leach and Company in New York and conducted our negotiations with Mr. Campbell and Mr. Leach.

The Court: And there were present then in addition to Mr. Campbell and Mr. Leach, yourself and your son?

The Witness: Yes, sir.

Q. Now, go on with the conversation, what was said with reference to this bond issue? A. The first negotiation, I believe, provided no definite sum to be—or def-

inite amount of bonds to be taken from the company, and Mr. Campbell subsequently agreed to take and pay for $800,000.00 of bonds; that is to say, that remained an option; it was not definite so far as an agreement to take them was concerned, but if they did take them they were to be paid for in cash up to the amount of $800,000.00. That agreement cleared the objection to the proposal of the fall of '21. Furthermore, there was a slight change in the price by changing the terms of the agreement in the mortgage as to the remainder of bonds from 15 per cent of the earnings, net earnings, to 25 per cent. That increased the price to ninety and a half of the bonds. Then it was agreed that the $450,000.00 worth of bonds following the $800,000.00 could be paid for at the rate recited in the contract.

The Court: Paid for by the exchange of stock?

The Witness: In that way.

The Court: Both of these propositions were carried into the written agreement, were they not?

The Witness: Yes, sir.

Q. Now, what was said, if anything, in that conversation with reference to what Leach and Company were to do by way of voting their preferred stock to make the mortgage possible?

The Court: Objection is made to that and objection overruled and exception allowed. The testimony may be recorded. What was said on that subject in your negotiation?

A. The agreement was that they were to give us their proxies to vote the preferred stock.

The Court: How much stock was stated by them?

The Witness: It was three thousand shares, possibly a little more; I think they had more than that, but certainly it was three thousand; but three thousand were turned in, I believe, to the trustee. The books of the company will show that.

The Court: Certainly, but whatever it was, it was the subject of discussion that day?

The Witness: Yes, sir.

The Court: Now, was there anything said in those negotiations at the office of Leach and Company, New York, as to the use which you expected to make or it was

intended to be made of the cash that was to be realized from the bonds?

The Witness: I think not.

The Court: Had you at that time when you were talking with Mr. Leach and Mr. Campbell in New York, procured the waivers of the preferred stockholders to the proposed bond issue?

The Witness: We had not; we could not take it up with the stockholders until we knew we could sell the bonds.

The Court: At the time this discussion was had with them, you had not procured any given number of waivers?

The Witness: I think not.

The Court: Do you know who afterwards performed the service of procuring the waivers?

The Witness: We sent out letters to our preferred stockholders and they sent up their proxies.

The Court: And all of them came back and were recorded as waived?

The Witness: Yes.

The Court: So the records will give that information?

The Witness: Yes.

The Court: As to the percentage of waivers?

The Witness: Exactly.

Q. Mr. Runyon, let me ask you whether or not the paper I show you is an original paper sent out by Leach and Company also to your preferred stockholders at the time that you were accumulating these proxies? A. I can't answer; I don't know; I don't know whether that was sent them or not.

Q. Now Mr. Runyon, what I want to know is, what if anything was said between you and Mr. Campbell at this interview prior to the making of this, giving of this option contract, as to the condition of executing this option with you or with them, provided that these people would give you their proxies or consent to the making of this mortgage?

Mr. Day: He has answered that, Your Honor. I object.

The Court: Anything that was said on that subject, you may repeat what you have already said or anything in addition to it.

A. They were to give us their proxies on this question—

The Court: Did you say anything other than or in addition to that on that subject, or was anything said by them on that subject?

The Witness: They wanted certain information; they wanted the opinion of our counsel; we told them we would furnish it, and we did furnish it.

The Court: The question now is with reference to the waiving of their rights, also what they said to you and what you said to them on that subject, if there is anything in addition to what you have already said, if you can recall.

The Witness: Well, I think it was understood that they, owning thirty per cent of the preferred stock, it would be impossible for us to secure seventy-five per cent consent of waivers of the preferred stockholders without their consent.

The Court: Was three thousand shares thirty per cent of the total outstanding preferred stock?

The Witness: No, let me see. No, I am mistaken there, there was $1,250,000.00, and they owned a little over three thousand shares.

The Court: Three thousand would be something less than a fourth?

The Witness: Yes, sir.

The Court: Well, all that was said on that subject you may give, and if you can't recall anything more and there is something that you know that he knows that you want to draw his attention to, do so. Go on.

Q. Now, just listen to my question, Mr. Runyon. What did they say to you about giving you their consent to this mortgage, and how was that dependent upon your giving them the option to exchange stock for bonds? What was said between you gentlemen on that subject, you and Mr. Campbell? A. It was understood that we were to send them this option, and upon receipt of the option they were to send us their proxies.

Q. What was said about it? You have given us their understanding of the conversation; just what was

said between you and him, if anything, with reference to your giving the option being dependent upon their consenting to this mortgage?

Mr. Day: I object to the form of this question. He has already answered it.

The Court: No, there is no assumption that this witness is friendly to one side rather than the other. So if he knows anything we want to get at it. A. I don't know as I understand just what do you mean by what was said. The negotiation was carried on in the usual ordinary manner, and the understandings between us, that we were to furnish them with legal opinion and furnish them with statements; we were to send them this option authorized by the board of directors; they were to send us their proxies to be voted at the meeting.

Q. And what was said by you to him, if anything, as to your unwillingness to give an option unless you could get his consent to the making of the mortgage? A. I don't know as that was ever brought out.

Q. You simply agreed that you would give the option to them to exchange stock for bonds, and they would in turn send you their consent for the three thousand shares to vote on the mortgage? A. Yes, sir.

Q. Was that about the upshot of the conversation? A. It was.

Cross Examination of the witness, Walter C. Runyon, by Mr. Day:

As a result of those talks that I had at New York with Mr. Campbell and Mr. Leach, the written option contract was entered into. As I understood it, it was necessary to get the consent of three-fourths of the preferred stockholders, in order to put on the bond issue. Mr. Campbell wanted an opinion of counsel as to whether this was proper in every way. I said that I had asked counsel about it and that he said it was proper. They asked me for some statements, and I furnished them. I furnished them an appraisal made by Brassert and Company; also the Lyon appraisal. The document you hand me, marked Defendant's Exhibit A, is the Lyon appraisal which I furnished to Leach & Company.

The document last mentioned was thereupon received in evidence as defendant's Exhibit A. Said document is as follows:

DEFENDANT'S EXHIBIT NO. A.

Lyon Appraisal.

ARTHUR M. LYON,
REAL ESTATE, LUMBER.
Struthers, Ohio.

STATE OF OHIO,
COUNTY OF MAHONING, SS.

Before me a Notary Public in and for said County and State, personally appeared Arthur M. Lyon who being duly sworn deposes and says, I am in the Real Estate business and have been dealing in Real Estate commercially and otherwise in this community for the last twenty years and believe that I am qualified to give a fair value appraisal of any parcel of Real Estate in this community, I do further say that the parcel of land now owned by the Struthers Furnace Company of Cleveland, Ohio, and consisting of 32.306 Acres located in the City of Struthers and being parts of O. L. 21 and O. L. 23 according to the latest enumeration of lots in the said City, should be valued at the rate Fifteen thousand Dollars ($15000.00) per acre. I have offered this appraisal after careful consideration and do say that it is a true appraisal as I verily believe.

(Signed) ARTHUR M. LYON.

Sworn to and Subscribed in my presence at Struthers, Ohio, this 29th day of April 1922.

(Signed) VICTOR H. GOOD,
Notary Public.

I don't know whether the document marked Defendant's Exhibit B 1-5 and signed by Brassert and Company is the Brassert appraisal which I handed Leach and Company about that time. It is one like it. The document you show me has the original signature, but my impression is that instead of being signed Freyn-Brassert and Company it was signed by H. A. Brassert, who was retained for this appraisal, and not Freyn-Brassert and Company. That is my recollection. I may be mistaken, but Brassert did make the appraisal.

The document marked Defendant's Exhibit B 1-5 was thereupon received in evidence, said document being as follows:

DEFENDANT'S EXHIBIT NO. B-1 TO 5.

Brassert Appraisal.

DEFENDANT'S EXHIBIT NO. B-1.

FREYN, BRASSERT & COMPANY
Engineers
STRUTHERS FURNACE COMPANY

Appraisal of Blast Furnace Plant at Struthers, Ohio.

Items	Replacement Value	% Depreciation	Sound Value
1. Blast Furnace Stack Excavation, concrete reinforcing steel & anchor bolts, brick in foundations, iron & steel work, cooling copper, brick lining, bosh piping	118,580.00	22.5	92,000.00
2. Skip Hoist— Excavation, concrete reinforcing steel & anchor bolts, steel caisson, incline, steel, operating mechanism, skip cars, four, hoist engine steam hoist engine house	35,765.00	23.4	27,400.00
3. Gas Cleaning System Including offtakes, downcomers, dust catcher & gas washer, excavation, concrete, reinforcing steel & anchor bolts, iron & steel work, brick linings, woodwork in washer, water piping	43,745.00	17.0	36,300.00
4. Cast House Excavation, concrete reinforcing steel & anchor bolts, building, paving & fill, iron & cinder runners, mud gun & tools	35,120.00	22.5	27,200.00

DEFENDANT'S EXHIBIT NO. B-2.

Items	Replacement Value	% Depreciation	Sound Value
5. Stoves Excavation, concrete & Masonry in foundations reinforcing steel & anchor bolts, iron & steel work, brick linings, water piping	166,220.00	30.2	116,000.00
6. Gas & Air Mains Foundations, iron & steel work	38,600.00	19.7	31,000.00
7. Pouring Equipment Car Haul, hot metal cars, 9-25 ton, pig machine, complete ladle house	80,150.00	32.7	53,800.00
8. Slag Disposal Excavation, concrete & masonry steam shovels car haul	41,075.00	27.8	29,600.00
9. Stock Bins & Trestles Excavation, concrete, reinforcing steel & anchor bolts, fill in approaches, iron & steel in bins, timber structural steel, scale cars, scale car track, and conductors.	152,200.00	30.	106,500.00
10. Boiler Plant Excavation, concrete, boilers sootblowers on 2-503 H. P. rusts-brick settlings, platforms, stacks & breechings, gas burner equipment steam & water piping, steam.	154,850.00	23.0	119,000.00

DEFENDANT'S EXHIBIT NO. B-3.

Items	Replacement Value	% Depreciation	Sound Value
11. Blowing Engine House Building, crane, foundations for equipment, blowing engines Weimer blowing engines—Todd blowing engines—Mesta Condensing equipment, feed water heaters & supports, boiler feed pumps, oil filters, gauges, etc. piping	337,100.00	26.	249,500.00
12. Power Plant Building, foundations for equipment, engine generator 200-Kw—D. C. Engine generator 400-Kw—D. C. Engine generator M. G. set —40 Kw. switchboard, air compressor, oil filters, gauges & instruments, piping.	86,100.00	18.0	70,600.00
13. Pump House (New) Foundations, building above foundation, crane & pumps & motors, water screens ventilating fan, piping	72,500.00	8.0	66,700.00
14. Pump House (Old) Building, pumps, suction well, water screens, piping	16,200.00	46.3	8,700.00
15. Stand Pipe Excavation, concrete reinforcing steel & anchor bolts, standpipe	12,495.00	13.	10,890.00

DEFENDANT'S EXHIBIT NO. B-4.

Items	Replacement Value	% Depreciation	Sound Value
16. Main Water Lines	17500.00	20.	14,000.00
17. Sewers	9,700.00	22.	7,500.00
18. Main Steam Lines	3,200.00	25.	2,400.00
19. Electrical Transmission & Yard Lighting	10,300.00	10.	9,270.00
20. R. R. Track & Scale Track, turnouts, track scale & scale house	81,400.00	24.	61,800.00
21. Locomotive	20,000.00	15.	17,000.00
22. R. R. Cars	279,000.00	6.5	261,000.00
23. Locomotive Cranes — Bucket & Magnet	46,000.00	30.	32,200.00
24. Auto Trucks	3,000.00	50.	1,500.00
25. Instruments & Laboratory Equipment	2,500.00	30.	1,750.00
26. Shop Tools & Equipment	9,200.00	50.	4,600.00
27. Fire Protection Equipment	600.00	17.	500.00
28. Fence	6,200.00	25.	4,650.00
29. Wagon Scale	1,800.00	20.	1,440.00

DEFENDANT'S EXHIBIT NO. B-5.

Items	Replacement Value	% Depreciation	Sound Value
30. Slag Plant Building, bins, Hoppers, & Chutes, machinery & conveying equipment	69,000.00	7.7	63,600.00
31. Thaw House	28,000.00	57.2	15,000.00
32. Shop Building	3,500.00	42.8	2,000.00
33. Office Building & Furniture	8,000.00	45.	4,400.00
34. Superintendent Residence	7,500.00	40.	4,500.00
35. Tenement Houses	11,000.00	50.	5,500.00
36. Lavatory	5,000.00	4.	4,800.00
37. Time Office, Tool & Store Houses & Miscellaneous small buildings	6,500.00	40.	3,900.00
38. Cement Mill Building	35,000.00	75.7	8,500.00
39. Stores	75,000.00	..	75.000.00
40. Engineering, general construction, expenses and contingencies	200,000.00		200,000.00
Total	$2,329,600.00	20.4	$1,852,000.00

FREYN, BRASSERT & Co.
Per H. A. Brassert
Chairman of the Board.

I furnished Brassert's appraisal about the same time the Lyon appraisal was furnished.

Q. Now, I am handing you next an audit report, marked for identification Defendant's Exhibit C, which purports to be an audit report of the Struthers Furnace Company, December 31st, 1921, of Ernst and Ernst; I will ask you if you furnished also Leach and Company with that about that time? A. I don't know whether we did or not.

Q. About the time you were having these talks and they were asking you for the statements and opinion of counsel? A. I have no doubt this is one of them.

The Court: Is there a date to that Ernst and Ernst audit?

The Witness: March 10, 1922. No, this one you have given me is December 31, 1920.

Mr. Day: They have got it audit report, Struthers Furnace Company December 31, 1921. That is evidently a typographical error.

Q. It is dated March 10, 1922? A. Yes.

Q. But nevertheless, that is one of the Ernst and Ernst reports? A. Yes.

The Court: Now, your statement is that you did submit an Ernst and Ernst audit to Leach and Company in connection with the option?

The Witness: Yes, sir.

Q. Now, I am going to have you look at another one, marked Defendant's Exhibit D, and on the outside of it it says, "Earnings, expenses and surplus account of the Struthers Furnace Company, Cleveland, for the period from May 1, 1911 to December 31, 1921," purporting to be a report from Ernst and Ernst. Is that one of the papers?

The Court: Did you furnish such a statement, to the best of your recollection?

The Witness: I don't know, Your Honor, whether we furnished it to them or not. I know such a statement was made.

Q. Were Ernst and Ernst your auditors? A. Yes, sir.

The Court: What is the date of that?

The Witness: This is covering a period from May 1, 1911, to December 31, 1921.

The Court: Is there a date on it when it was prepared?

The Witness: April 28, 1921.

Q. What was that date? A. April 28, 1921.

Q. That was about the time the negotiations were had and at the time you asked for these statements? A. No, I wouldn't say that.

The Court: No, it was '22 the statements were asked for.

The Witness: This was a record of the company's transactions from the period 1911 to 1921.

Q. I have another paper here, marked Defendant's Exhibit E, purporting to be a statement from Ernst and Ernst, certified public accountants, to Mr. W. C. Runyon, president of the Struthers Furnace Company, under date of April 10, 1922; I will ask you if that is not the one you gave to Leach and Company? (Handing to witness) A. Yes, sir.

Mr. Day: I offer those exhibits in connection with the cross examination of the witness.

Mr. Wilson: Let me ask a few questions first.

RE-DIRECT EXAMINATION.

By Mr. Wilson:

Q. Mr. Runyon, who transacted the business of forwarding these statements and so forth, to Leach and Company? Was it you personally? A. No, sir.

Q. Well, are you able to personally identify any of these papers as being the documents that were given to Leach and Company pursuant to their option to purchase? A. I can't say that I am, that I can. I know the statement was made up at our request, but to technically answer your question—I live in New York; I live in New York and have for twenty-five years.

The Court: You say these were made up at your request, either their request or your request?

The Witness: Both. We requested Ernst and Ernst to make up the statements, but they wanted them.

The Court: In what connection?

The Witness: In connection with this negotiation to show the summary of earnings of the company. This covers the years 1917, '18, '19, '20 and '21.

Mr. Henderson: I might suggest to Your Honor that the balance sheet that was contained in the application of Leach and Company for exemption of these bonds is the balance sheet set up in the Ernst and Ernst audit for December 31, 1921.

The Court: That would indicate the genuineness of the papers; whether they were transmitted by this man, they were transmitted by some one. There ought not to be any difficulty separating that out.

By Mr. Wilson:

Q. I will ask you, Mr. Runyon, were Leach and Company interested and active also in procuring an appraisement of your assets prior to the making of this mortgage, if you know? A. No.

Q. To refresh your memory, I refer you to a letter dated May 2nd, purporting to be from Leach and Company to the Struthers Furnace Company? (handing to witness) A. This letter is addressed to my son.

Q. Well, it is addressed to the Struthers Furnace Company? A. Struthers Furnace Company.

The Court: What knowledge has he on the subject? The letter will speak for itself, Mr. Wilson.

Q. Do you know anything about this letter? A. I do not.

The Court: Exhibits A, B, C and E, I think are competent.

Thereupon Defendant's Exhibits C and E were received in evidence, said Exhibits being, respectively, as follows:

DEFENDANT'S EXHIBIT NO. C.

AUDIT REPORT

THE STRUTHERS FURNACE COMPANY

CLEVELAND

DECEMBER 31ST, 1921

REPORT FROM

ERNST & ERNST

AUDITS AND SYSTEMS

C O N T E N T S

	Original Report	This Record
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INCOME & EXPENSE.....	11	115
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INVENTORY.....	14	119
OTHER ASSETS.....	15	121
PLANT AND EQUIPMENT.....	16	123
DEFERRED	17	125
NOTES PAYABLE.....	18	127

PRINTER'S NOTE:

In the Original Audit Report from which the ensuing pages were reproduced certain of the figures were typewritten with a red ribbon and others with a green one. For example:

On page 101 (original page 3) the figures in the right hand column, roughly underscored with a pen line, were red in the Original Report, while the totals (similarly underscored) in the other two columns were in green.

On page 103 (original page 4) the figures in the right hand column, roughly underscored with a pen line, were red in the Original Report, while the totals (similarly underscored) near the top of the other two columns were in green.

On page 105 (original page 4) the figures and words, roughly underscored with a pen line, were red in the Original Report.

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ERNST & ERNST

AUDITS AND SYSTEMS

TAX SERVICE

CLEVELAND

HANNA BUILDING

March 10th, 192

Board of Directors and Stockholders,
The Struthers Furnace Company,
Cleveland.

Gentlemen:-

We have audited the books of account and record STRUTHERS FURNACE COMPANY - CLEVELAND, for the year ende ber 31st, 1921, and submit herewith our report.

Below is set forth a condensed statement of th Liabilities of the Company at the close of business Dece shown in greater detail in the accompanying Balance Shee also being made with the corresponding items as of the c December 31st, 1920:

	DEC.31-1921	DEC.31-19
ASSETS		
CURRENT		
Cash	$ 2,939.20	$ 14,982
U. S. Government Securities	49,096.97	68,796
Notes Receivable	-o-	3,539
Accounts Receivable	41,020.48	440,129
Inventory	1,397,819.97	1,954,023
Life Insurance (Cash Surrender Value)	29,350.00	27,950
TOTAL CURRENT	$1,520,226.62	$2,509,421
RAILROAD EQUIPMENT	330,518.34	269,882
OTHER ASSETS	153,184.76	138,695
INVESTMENTS	653,347.39	642,722
PERMANENT	1,035,879.57	1,055,228
DEFERRED	132,245.79	143,778
	$3,825,402.47	$4,759,728
LIABILITIES		
CURRENT		
Notes Payable	$1,033,340.89	$ 644,974
Accounts Payable	14,058.69	699,848
Accrued Accounts	38,384.86	85,061
TOTAL CURRENT (FWD.)	$1,085,784.44	$1,429,883

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TOLEDO
DETROIT

CLEVELAND

HANNA BUILDING

ATLANTA
DALLAS
FORT WORTH
HOUSTON

March 10th, 1922.

Board of Directors and Stockholders,
The Struthers Furnace Company,
Cleveland.

Gentlemen:-

We have audited the books of account and record of THE STRUTHERS FURNACE COMPANY - CLEVELAND, for the year ended December 31st, 1921, and submit herewith our report.

Below is set forth a condensed statement of the Assets and Liabilities of the Company at the close of business December 31st, 1921. shown in greater detail in the accompanying Balance Sheet, comparison also being made with the corresponding items as of the close of business December 31st, 1920:

	DEC.31-1921	DEC.31-1920	INCREASE DECREASE
ASSETS			
CURRENT			
Cash	$ 2,939.20	$ 14,982.30	$ 12,043.10
U. S. Government Securities	49,096.97	68,796.28	19,699.31
Notes Receivable	-o-	3,539.47	3,539.47
Accounts Receivable	41,020.48	440,129.86	399,109.38
Inventory	1,397,819.97	1,954,023.52	556,203.55
Life Insurance (Cash Surrender Value)	29,350.00	27,950.00	1,400.00
TOTAL CURRENT	$1,520,226.62	$2,509,421.43	$989,194.81
RAILROAD EQUIPMENT	330,318.34	269,882.69	60,635.65
OTHER ASSETS	153,184.76	138,695.68	14,489.08
INVESTMENTS	653,347.39	642,722.10	10,625.29
PERMANENT	1,035,879.57	1,055,228.31	19,348.74
DEFERRED	132,245.79	143,778.10	11,532.31
	$3,825,402.47	$4,759,728.31	$934,325.84
LIABILITIES			
CURRENT			
Notes Payable	$1,033,340.89	$ 644,974.21	$388,366.68
Accounts Payable	14,058.69	699,848.17	685,789.48
Accrued Accounts	38,384.86	85,061.15	46,676.29
TOTAL CURRENT (FWD.)	$1,085,784.44	$1,429,883.53	$344,099.09

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Figures underscored in Black should be Green

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Figures

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Figures

Our certificate or report upon any audit or investigation to be furnished by us or with the distinct understanding that any such certificate, publication, or copy therefrom, in full or in part, of such certificate or report, shall be in the form to be approved by us.
As a preventive against fraud, attention is directed to the fact that all pages of this report should bear our initial mark.

	DEC.31-1921	DEC.31-1920	INCREASE DECREASE
(FORWARD).....	$1,085,784.44	$1,429,883.53	$344,099.09
THE STRUTHERS COAL & COKE COMPANY.....	268,680.72	292,723.35	24,042.63
RESERVES.....	138,686.78	197,827.42	59,140.64
NOMINAL			
Capital Stock:			
Preferred-7% Cumulative.....	$1,250,000.00	$1,250,000.00	$ -o-
Common.....	1,000,000.00	1,000,000.00	-o-
Surplus.....	82,250.53	589,294.01	507,043.48
TOTAL NOMINAL.....	$2,332,250.53	$2,839,294.01	$507,043.48
	$3,825,402.47	$4,759,728.31	$934,325.84

The transactions affecting the Company's Surplus Account for the year ended December 31st, 1921, are summarized as follows:

BALANCE December 31st, 1920.....		$589,294.01
CHARGE		
Discount taken during 1920 in error.....		8,258.91
ADJUSTED SURPLUS DECEMBER 31ST, 1920.....		$581,035.10
DEDUCTIONS		
Net Loss for the year.....	$361,096.39	
Decrease in book value of Capital Stock of The Struthers Coal & Coke Company.....	31,765.11	
Additional provision for prior years' Federal Taxes.....	23,517.45	
Dividends Paid - Preferred 7%.....	87,500.00	
	$503,878.95	
Less: Increase in value of Liberty Bonds to market value.....	5,094.38	
NET DEDUCTIONS.....		498,784.57
BALANCE DECEMBER 31ST, 1921.....		$ 82,250.53

A comparison of the Company's operating results for the years ended December 31st, 1921 and December 31st, 1920, is set forth in the following condensed statement:

	YEAR ENDED DEC.31-1921	YEAR ENDED DEC.31-1920	INCREASE DECREASE
Sales.....	$817,543.54	$4,225,395.43	$3,407,851.89
Less: Discounts and other Allowances.....	13,472.13	3,644.62	9,827.51
NET SALES (FWD.).....	$804,071.41	$4,221,750.81	$3,417,679.40

	YEAR ENDED DEC.31-1921	YEAR ENDED DEC.31-1920	INCREASE DECREASE
(FORWARD)	$804,071.41	$4,221,750.81	$3,417,679.40
Cost of Sales	755,388.57	3,556,660.40	2,801,271.83
GROSS PROFIT	$ 48,682.84	$ 665,090.41	$ 616,407.57
Selling, General and Administrative Expense	184,949.87	264,373.67	79,423.80
OPERATING PROFIT-LOSS	$136,267.03	$ 400,716.74	$ 536,983.77
Other Deductions - Net	224,829.36	154,810.07	70,019.29
PROFIT-LOSS BEFORE PROVIDING FOR ESTIMATED FEDERAL TAXES AND CONTINGENCIES	$361,096.39	$ 245,906.67	$ 607,003.06
Provision for estimated Federal Taxes and Reserve for Contingencies	-o-	30,000.00	30,000.00
NET PROFIT-LOSS	$361,096.39	$ 215,906.67	$ 577,003.06

Our comments relative to verification of the Assets and Liabilities, as stated in the accompanying Balance Sheet, follow:

We verified the Petty Cash Fund at the Cleveland Office by actual count on January 31st, 1922, and reconcilement with the amount shown by the Company's books as being on hand at December 31st, 1921. No verification of the pay roll fund carried at the plant was made by us. Cash on deposit was verified by direct correspondence with the depository banks and reconcilement of the balances reported with those shown by the books of the Company. All recorded Cash receipts for the period under audit were traced by us directly into the bank deposits and all recorded Cash disbursements for the same period were found to be supported by cancelled bank checks, except such checks as appeared to be outstanding at December 31st, 1921, and further supported by invoices, pay rolls and other data on file.

U. S. Government Securities, consisting of various issues of Liberty Bonds and War Savings Stamps, were fully accounted for by personal inspection of the securities.

Following is a list of Customers' Accounts of record at December 31st, 1921:

NAME	AMOUNT
Baker, B. L.	$ 733.09
Central Steel Company, The	38,514.31
Dover Manufacturing Company, The	5.50
Pittsburgh & Lake Erie Railroad Company	54.00
Standard Slag Company, The	608.85
Ward Nail Company, The	1,100.93
Youngstown Ice Company, The	3.80
TOTAL	$41,020.48

We analyzed the foregoing accounts as to date of charge or subsequent liquidation as shown below:

DATE OF CHARGE AND SUBSEQUENT PAYMENTS	AMOUNT
Payments subsequent to January 1st, 1922 and prior to completion of our examination	$ 608.85
December 1921	38,699.66
November 1921	513.75
October 1921	348.50
May 1st, to September 30th, inclusive	266.63
Prior to May 1st, 1921	583.09
TOTAL	$41,020.48

The inventory value of Ore is stated in this Balance Sheet in the amount of $1,112,196.61 on the basis of 1921 Season Ore Prices, while Pig Iron, other Raw Material and Supplies are valued at the lower of cost or approximate market value as determined by the management. The aggregate value of this inventory has been certified to us by a responsible official of the Company and we have made thorough tests as to mathematical accuracy of computations and method of valuation.

The amount of $29,350.00 represents the Cash surrender value of $15,500.00 of a life insurance policy for $50,000.00 on the life of W. C. Runyon, Sr., together with the Company's equity of $13,850.00 in the Cash surrender value of two similar policies for $25,000.00 each. Under the terms of an agreement, dated November 22nd, 1921, the Company is relieved of paying any further premiums on the last two policies mentioned and relinquishes its rights to any future proceeds of the policies over and above the equity specified.

Railroad Equipment is represented at the depreciated book value of $330,518.34 at December 31st, 1921. We examined all additions to this account during the current year, amounting to $67,555.29, and in our opinion, based upon our inspection of the supporting data on file, the charges so made represent items properly capitalizable. An allowance of $6,919.64 for depreciation has been provided on the Company's books for the year.

We have included under the caption of Other Assets, Personal and Miscellaneous Accounts Receivable, Customers' Long Term Notes Receivable, which were examined by us, the value remaining in the Struthers Savings & Banking Company account, which Company is in process of liquidation, and Deposit on Workmen's Compensation Claim. Exhibit setting forth these items in greater detail is included elsewhere in t is report.

The Company's investment in The Struthers Coal & Coke Company, the entire amount of Capital Stock of which Company is owned by The Struthers Furnace Company, is stated in the accompanying Balance Sheet in the amount of $12,671.89, as reflected by a separate audit made by us of that Company's books as of December 31st, 1921. The one-half interest of $340,675.50 in the Helmer-Wade Ore Mine is stated at cost, as supported by records on file submitted by The Cleveland Cliffs Iron Company.

The depreciated value of Real Estate, Furnace Plant and Equipment, Furniture and Fixtures, etc., as shown by the Company's records at December 31st, 1921, amounted to $1,035,879.57. We examined all additions to these accounts for the year under audit, and, in our opinion, based upon the data examined and other information obtained, such additions have been properly capitalized. Allowance has been provided on the Company's books for the current year for depreciation of Furnace Plant and Equipment, Furniture and Fixtures, etc., by a charge against operations in the amount of $23,440.25.

Classified as Deferred Assets, are the prepaid value of dock storage, taxes, interest, unexpired insurance premiums, etc., and preferred stock underwriters expense, all of which, in our opinion, represent items properly chargeable against the Company's future operations

Full provision has been made under Current Liabilities, aggregating $1,085,784.44, for all ascertained liability of the Company at December 31st, 1921, for notes given for money borrowed and for ore purchased, for unpaid purchases, expenses, pay roll, etc., as well as accrued items, disclosed by the records examined and information obtained by us. We verified the Company's liability for notes payable, as stated, together with open account with The Cleveland Cliffs Iron Company, by direct correspondence.

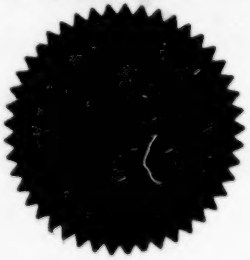
We verified the open account with The Struthers Coal & Coke Company by audit of that Company's books.

Attention is directed to the fact that the accompanying Balance Sheet is subject to any necessary adjustment upon determination of the final liability of the Company for prior years' Federal Taxes.

We verified the outstanding Preferred 7% Cumulative Capital Stock, aggregating $1,250,000.00, by direct correspondence with the Transfer Agent, and the Common Stock, aggregating $1,000,000.00, by trial balance of the stock certificate stubs. Dividends on Preferred Stock have been paid to November 1st, 1921.

Information obtained by us, supported by certification made to us by a responsible official, indicated that the Company was not obligated to any appreciable extent at December 31st, 1921, on any purchase or sales contracts to be liquidated at stipulated prices differing from current market quotations.

WE HEREBY CERTIFY, that we have audited the books of account and record of THE STRUTHERS FURNACE COMPANY - CLEVELAND, as herein outlined, and that, in our opinion, based upon the records examined and information obtained by us and subject to any necessary adjustment upon determination of final liabil ty for prior years' Federal Taxes, the accompanying Balance Sheet is drawn up so as to correctly set forth the financial position of the Company at the close of business December 31st, 1921, and the relative Operating Statement is correct.



Very truly yours,

Ernst & Ernst

Certified Public Accountants

BALANCE

THE STRUTHERS FURNACE COMPANY - CLEVELAND

At the close of business December 31st, 1921.

ASSETS

CURRENT			
CASH			
Office Fund		$ 807.67	
Pay Roll Fund		329.22	
On Deposit		1,802.31	$ 2,939.20
U. S. GOVERNMENT SECURITIES			
Liberty Bonds (Various Issues)	$ 48,800.00		
Less: Allowance to reduce to market value 1,123.01	1,123.01	$ 47,676.99	
Accrued Interest		501.98	$ 48,178.97
War Savings Stamps			918.00
			49,096.97
ACCOUNTS RECEIVABLE			
Customers			41,020.48
INVENTORY			
Ore-On Basis of 1921 Season Ore Prices		$1,112,196.61	
Pig Iron, Other Raw Materials and Supplies-At lower of Cost or approximate Market Value		285,623.36	1,397,819.97
			39,380.00
LIFE INSURANCE (Cash Surrender Value)			$1,530,226.62
RAILROAD EQUIPMENT			
Coke Cars and Locomotive			$ 351,562.58
Less: Allowance for Depreciation			21,044.24
			330,518.34
OTHER ASSETS			
Personal and Miscellaneous Accounts Receivable			$ 149,654.14
Customers' Notes Receivable (Long Term)		$ 2,219.84	
Accrued Interest		64.75	2,284.59
Struthers Savings & Banking Company		$ 1,206.45	
Less: Allowance for possible shrinkage		452.42	754.03
Deposit on Workmen's Compensation Claim			492.00
			153,184.76
INVESTMENTS			
THE STRUTHERS COAL & COKE COMPANY			
Book Value of Stock at December 31st, 1921			312,671.89
UNDIVIDED ONE-HALF INTEREST IN ORE MINE (At Cost)			
Palmer-Wade Mine			340,675.50
			653,347.39
PERMANENT			
Real Estate			$ 208,896.00
Furnace Plant and Equipment	$1,169,134.20		
Furniture and Fixtures	4,281.84		
Automobiles	3,719.75	$1,177,135.79	
Less: Allowance for Depreciation		358,627.17	818,508.62
			$1,027,404.62
Cement Plant, Machinery and Equipment			8,474.95 1,035,879.57
DEFERRED			
Prepaid Dock Storage, Taxes, Interest, Unexpired Insurance Premiums, etc.			$ 32,245.79
Preferred Stock Underwriting Expense			100,000.00 132,245.79
			$3,828,402.47

LIABILITIES

CURRENT			
NOTES PAYABLE			
For Money Borrowed-From Banks		$ 700,000.00	
For Ore Purchased		333,340.89	$1,033,340.89
ACCOUNTS PAYABLE			
For Purchases, Expenses, etc.		$ 9,552.41	
The Cleveland Cliffs Iron Co., For proportionate cost of operating Palmer-Wade Mine		3,283.37	
Unpaid Pay Roll		809.40	
Unclaimed Wages		96.60	
Miscellaneous		317.91	14,058.69
ACCRUED ACCOUNTS			
Taxes-Real and Personal			38,384.86 $1,085,784.44
THE STRUTHERS COAL & COKE COMPANY			
Open Account-December 31st, 1921			268,680.72
RESERVES			
Workmen's Liability Insurance			196.71
For Contingencies			138,490.07 138,686.78
CAPITAL			
CAPITAL STOCK			
PREFERRED-7% CUMULATIVE			
Authorized and Issued		$1,250,000.00	
COMMON			
Authorized and Issued		1,000,000.00	$2,250,000.00
SURPLUS			
Balance December 31st, 1921			82,250.53 2,332,250.53

(Note A) The Company was reported to us as being contingently liable at December 31st, 1921, in the amount of $75,000.00 for Trade Acceptances discounted.

(Note B) This Balance Sheet is subject to adjustment, if any, upon final review by the Government of prior years' Federal Tax Returns.

(Note C) This Balance Sheet is subject to the comments contained in our "Certificate", included in and made a part of this report.

$3,828,402.47

INCOME & EXPENSE

THE STRUTHERS FURNACE COMPANY - CLEVELAND

For the year ended December 31st, 1921.

INCOME			
SALES			
Furnace Product		$ 817,543.54	
LESS:			
Returns and Allowances	$ 12,506.01		
Freight Out	966.12	13,472.13	
NET SALES			$ 804,071.41
COST OF SALES			
ORE MINE OPERATIONS			
Inventory January 1st, 1921	$ 55,487.00		
Labor	46,532.94		
Mine Supplies and Expense	22,507.31		
Accounting Expense	12,172.62		
Taxes (Estimated)	7,500.00		
Depreciation	6,446.95		
Adjustment of Supplies Inventory	5,066.80		
Maintenance and Repairs	4,031.87		
Loss on House Rentals-Net	1,567.89		
Miscellaneous	279.81	$ 371,593.19	
LESS:			
Inventory December 31st, 1921	$ 346,419.20		
Excess amount of Ore received during 1920 returned in 1921	15,715.57		
Adjustment of Ore Inventory	9,205.67		
Profit on Sale of Equipment	185.15		
Miscellaneous Income	67.60	371,593.19	$ -0-
FURNACE OPERATIONS			
Inventory of Pig Iron January 1st, 1921	$ 582,335.01		
Ore charged to Furnace	146,217.51		
Coke charged to Furnace	94,057.10		
Repairs, Relining Furnace, etc.	57,860.05		
Labor	39,530.59		
Limestone	11,669.09		
Supplies (Less: Discount Earned)	4,432.98		
Demurrage, Switching and Extra Handling of Pig Iron	2,443.20		
Coal	2,022.01		
Miscellaneous	1,715.71	$ 942,283.25	
LESS:			
Inventory of Pig Iron December 31st, 1921	150,646.01		
Adjustment of Pig Iron Inventory	34,751.88		
Sale of Electric Current	1,496.79	186,894.68	755,388.57
			755,388.57
GROSS PROFIT (FWD.)			$ 48,682.84

GROSS PROFIT (FWD.)			$ 48,682.84
EXPENSE			
SELLING, GENERAL AND ADMINISTRATIVE			
Administrative Salaries	$ 72,250.00		
Taxes	44,065.85		
Office Salaries	16,517.60		
Commission	13,904.02		
Insurance	10,167.49		
Legal and Professional	8,746.92		
Office Rent, Supplies and Expense	5,960.92		
Telephone and Telegraph	1,643.98		
Advertising	2,381.00		
Traveling and Entertaining	3,609.27		
Assessments, Dues and Subscriptions	2,232.30		
Postage and Revenue Stamps	956.54		
Registrar and Transfer Fees	911.75		
Directors' Fees	520.00		
Miscellaneous	82.23	184,949.87	
OPERATING LOSS			$ 136,267.03
OTHER DEDUCTIONS			
Interest - Net	$ 87,412.17		
Depreciation	30,389.89		
Adjustment of pricing of Inventory at December 31st, 1921 to lower of Cost or Market Value	82,265.85		
Idle Expense-Helmer-Wade Mine	27,087.36		
Exploratory Expense	3,826.13		
Loss on Sale of Coke	2,557.12		
Donations	1,741.70		
Life Insurance Premium	1,094.09	$ 236,344.33	
OTHER INCOME			
Rent of Buildings	7,789.41		
Railroad Equipment Revenue	1,534.35		
Miscellaneous	1,042.16		
Premium on handling Slag	589.04		
Profit on exchange of Ore	560.01	11,514.97	
OTHER DEDUCTIONS-NET			224,829.36
LOSS FOR PERIOD			$ 361,096.39

SURPLUS

THE STRUTHERS FURNACE COMPANY - CLEVELAND

December 31st, 1921.

SURPLUS December 31st, 1920 - as shown by Audit Report		$ 569,294.01
CHARGE		
Discount on Limestone purchased during 1920 taken in error		8,258.91
ADJUSTED SURPLUS DECEMBER 31ST, 1920		$ 561,035.10
DEDUCTIONS		
Net Loss from operations for the year ended December 31st, 1921 - as shown by Statement of Income & Expense	$ 361,096.39	
Additional provision for Federal Taxes for prior period, subject to adjustment upon determination of final liability therefor	23,517.45	
Decrease in book value of Capital Stock of The Struthers Coal & Coke Company at December 31st, 1921 - as shown by Audit Report of that Company	31,765.11	
Preferred Stock Dividend-7%	87,500.00	
	$ 503,878.95	
ADDITION		
Increase in value of Liberty Bonds to market value	5,094.38	498,784.57
SURPLUS DECEMBER 31ST, 1921, AS SHOWN BY THIS REPORT		$ 62,250.53

INVENTORY

THE STRUTHERS FURNACE COMPANY - CLEVELAND

December 31st, 1921.

ORE			
On Hand at Furnace		$ 596,297.10	
At Dock:			
Helmer-Wade	$ 260,788.12		
Struthers and Cambridge	169,480.31	430,268.43	
At Mine		85,631.08	$1,112,196.61
OTHER RAW MATERIALS			
ON HAND			
Pot Scrap	$ 13,254.94		
Limestone	7,270.25		
Dolomite	7,231.46		
Coal	7,080.00		
Cinder	5,736.78		
Coke	5,179.97		
Borings	3,863.87		
Copper Scrap	1,674.84		
Sinter	1,402.18		
Sand	691.50		
Loam	45.50		
Slag	18.00	$ 53,449.29	
FINISHED MATERIAL			
Pig Iron		150,646.01	
SUPPLIES			
Furnace Department	$ 80,733.09		
Cement Department	794.97	81,528.06	285,623.3
		TOTAL	$1,397,819.9

OTHER ASSETS

THE STRUTHERS FURNACE COMPANY - CLEVELAND

December 31st, 1921.

PERSONAL AND MISCELLANEOUS ACCOUNTS RECEIVABLE		
Demer, R. H.	$ 447.59	
Grossman, A.	471.93	
Runyon, R. E.	634.81	
Runyon, W. C., Jr.	4,976.15	
Runyon, W. C., Sr.	142,512.73	
Sowers, J. M. - Insurance Claim	447.85	
U. S. Government - Penalty Claim	163.08	$ 149,654.14
NOTES RECEIVABLE - LONG TERM		
Customers	$ 2,219.84	
Accrued Interest	64.75	2,284.59
STRUTHERS SAVINGS & BANKING COMPANY		
Bank Account - Liquidating	$ 1,206.45	
Less: Allowance for possible shrinkage	452.42	754.03
DEPOSIT		
Workmen's Compensation Claims		492.00
	TOTAL	$ 153,184.76

PLANT AND EQUIPMENT

THE STRUTHERS FURNACE COMPANY - CLEVELAND

December 31st, 1921.

	FURNACE DEPARTMENT	CEMENT DEPARTMENT	FURNITURE AND FIXTURES	AUTOMOBILES	TOTAL
alance Decem- ber 31st, 1920	$1,165,042.69	$ 8,474.95	$ 4,281.84	$ 3,719.75	$1,181,519.23
dditions	4,091.51	-o-	-o-	-o-	4,091.51
	$1,169,134.20	$ 8,474.95	$ 4,281.84	$ 3,719.75	$1,185,610.74

llowance for Depreciation:		
Balance December 31st, 1920	$335,186.92	
Provision during current year	23,440.25	358,627.17
BALANCE DECEMBER 31ST, 1921		$ 826,983.57

ADDITIONS

	LABOR	MATERIALS AND OUTSIDE CONSTRUCTION	ALLOWANCE FOR DEPRECIATION
onstruction	$ -o-	$ -o-	$ 20,413.60
asoline Station	-o-	76.66	4.58
avatory	-o-	319.01	210.03
ew Water Mains	-o-	-o-	87.78
re Thawing Plant	-o-	480.54	262.77
lag Plant	-o-	-o-	2,269.43
ose House	-o-	-o-	2.13
ew Generator	-o-	2,102.32	24.53
tore Room Additions	269.70	571.77	5.36
aboratory Equipment	-o-	271.51	-o-
TOTAL FURNACE DEPARTMENT		$ 4,091.51	$ 23,280.21
URNITURE AND FIXTURES		-o-	85.64
UTOMOBILES		-o-	74.40
		$ 4,091.51	$ 23,440.25

DEFERRED

THE STRUTHERS FURNACE COMPANY - CLEVELAND

December 31st, 1921.

Dock Storage	$ 13,792.88	
Interest on Notes Payable	8,484.18	
Unexpired Insurance Premiums	6,550.86	
Corporate Taxes	2,297.50	
Prepaid Subscriptions, etc.	694.75	
Unexpired Life Insurance Premiums	425.62	$ 32,245.79
Preferred Stock-Underwriters' Expense		100,000.00
	TOTAL	$ 132,245.79

NOTES PAYABLE

THE STRUTHERS FURNACE COMPANY - CLEVELAND

December 31st, 1921.

DATE	DUE DATE	AMOUNT
FOR MONEY BORROWED		
UNION TRUST COMPANY - CLEVELAND		
Oct. 3-1921	Jan. 3-1922	$ 50,000.00
Oct. 4-1921	Jan. 3-1922	50,000.00
Oct. 17-1921	Jan. 16-1922	100,000.00
Nov. 15-1921	Feb. 14-1922	50,000.00
Nov. 21-1921	Feb. 20-1922	50,000.00
Nov. 21-1921	Feb. 20-1922	75,000.00
Dec. 12-1921	Mar. 13-1922	50,000.00
Dec. 19-1921	Mar. 20-1922	100,000.00
Dec. 21-1921	Mar. 21-1922	75,000.00
Dec. 27-1921	Mar. 27-1922	100,000.00
		$ 700,000.00
FOR PURCHASE OR ORE		
CLEVELAND CLIFFS IRON COMPANY - CLEVELAND		
Oct. 3-1921	Jan. 3-1922	$ 184,151.71
Oct. 24-1921	Jan. 24-1922	54,594.59
Oct. 24-1921	Jan. 24-1922	54,594.59
Dec. 19-1921	Mar. 20-1922	40,000.00 — 333,340.89
	TOTAL	$1,033,340.89

SUMMARY OF MATURITIES

January	1922	$ 493,340.89
February	1922	175,000.00
March	1922	365,000.00
	TOTAL	$1,033,340.89

CABLE ADDRESS "ERNSTAUDIT" NEW YORK

NEW YORK
PHILADELPHIA
BOSTON
PROVIDENCE
WASHINGTON
RICHMOND
BUFFALO
PITTSBURGH
CLEVELAND
CINCINNATI
TOLEDO
DETROIT

ERNST & ERNST

AUDITS AND SYSTEMS
TAX SERVICE

CLEVELAND
HANNA BUILDING

CHICAGO
MINNEAPOLIS
ST. PAUL
INDIANAPOLIS
DENVER
ST. LOUIS
KANSAS CITY
NEW ORLEANS
ATLANTA
DALLAS
FT. WORTH
HOUSTON

FILE COPY
PLEASE RETURN TO
STATISTICAL DEPARTMENT

129

Defendant's Exhibit No. 16

6 6 6

Cleveland, April 24th, 1922.

Mr. W. C. Runyon,
Pres., The Struthers Furnace Company,
Cleveland.

Dear Sir:-

In accordance with request we have compiled from our Audit Reports previously rendered for THE STRUTHERS FURNACE COMPANY, CLEVELAND, covering the period from May 1st, 1916 to December 31st, 1921, inclusive, and submit herewith Summary of Earnings, Interest and Federal Taxes, together with brief statement of transactions affecting the Company's Surplus Account for the period named.

SUMMARY OF EARNINGS

PERIOD	PROFIT-LOSS EXCLUSIVE OF INTEREST AND FEDERAL TAXES	INTEREST	ESTIMATED FEDERAL TAXES AND CONTINGENCIES	NET PROFIT-LOSS
Year ended April 30-1917..	$ 285,597.59	$ 43,718.27	$ 34,559.55	$207,319.77
Eight months ended Dec.31-1917.	548,205.26	18,460.76	212,313.00	317,431.50
Year ended:				
Dec. 31-1918...	1,105,545.69	9,499.46	800,000.00	296,046.23
Dec. 31-1919...	141,128.07	29,730.45	15,000.00	96,397.62
Dec. 31-1920...	272,004.40	34,356.64	30,000.00	207,647.76
Dec. 31-1921...	268,589.84	87,412.17	-o-	355,002.01
TOTAL FOR PERIOD.	$2,083,891.17	$223,177.75	$1,091,872.55	1,768,840.87
YEARLY AVERAGE...	$ 367,529.30			$135,500.03

SURPLUS ACCOUNT

SURPLUS May 1st, 1916, adjusted to include subsequent miscellaneous charges applicable prior			$ 239,285.19
Add:			
Net Profit for the period from May 1st, 1916 to December 31st, 1921, as shown by above summary	$ 768,840.87		
Net Adjustment of Book Value of Capital Stock of The Struthers Coal & Coke Company	206,409.16	975,250.03	
			$1,214,535.22
Less: Loss on obsolete Cement Department Equipment	$ 75,000.00		
Dividends paid during period:			
Cash	$807,284.69		
Stock	250,000.00	1,057,284.69	1,132,284.69
SURPLUS DECEMBER 31ST, 1921			$ 82,250.53

WE HEREBY CERTIFY, that we have audited the books of account and record of THE STRUTHERS FURNACE COMPANY - CLEVELAND, for the period from May 1st, 1916 to December 31st, 1921, inclusive, and that, in our opinion, based upon the records examined and information obtained by us

Pres., The Struthers Furnace Company,
Cleveland.

Defendant's Exhibit No. 6

Dear Sir:-

In accordance with request we have compiled from our Audit Reports previously rendered for THE STRUTHERS FURNACE COMPANY, CLEVELAND, covering the period from May 1st, 1916 to December 31st, 1921, inclusive, and submit herewith Summary of Earnings, Interest and Federal Taxes, together with brief statement of transactions affecting the Company's Surplus Account for the period named.

SUMMARY OF EARNINGS

PERIOD	PROFIT-LOSS EXCLUSIVE OF INTEREST AND FEDERAL TAXES	INTEREST	ESTIMATED FEDERAL TAXES AND CONTINGENCIES	NET PROFIT-LOSS
Year ended April 30-1917..	$ 285,597.59	$ 43,718.27	$ 34,559.55	$207,319.77
Eight months ended Dec.31-1917.	548,205.26	18,460.76	212,313.00	317,431.50
Year ended:				
Dec. 31-1918...	1,105,545.69	9,499.46	800,000.00	296,046.23
Dec. 31-1919...	141,128.07	29,730.45	15,000.00	96,397.62
Dec. 31-1920...	272,004.40	34,356.64	30,000.00	207,647.76
Dec. 31-1921...	268,589.84	87,412.17	-o-	355,002.01
TOTAL FOR PERIOD.	$2,083,891.17	$223,177.75	$1,091,872.55	768,840.87
YEARLY AVERAGE...	$ 367,529.30			$135,592.03

SURPLUS ACCOUNT

SURPLUS May 1st, 1916, adjusted to include subsequent miscellaneous charges applicable prior		$ 239,285.19
Add:		
Net Profit for the period from May 1st, 1916 to December 31st, 1921, as shown by above summary	$ 768,840.87	
Net Adjustment of Book Value of Capital Stock of The Struthers Coal & Coke Company	206,409.16	975,250.03
		$1,214,535.22
Less: Loss on obsolete Cement Department Equipment	$ 75,000.00	
Dividends paid during period:		
Cash	$807,284.69	
Stock	250,000.00	1,057,284.69	1,132,284.69
SURPLUS DECEMBER 31ST, 1921...		$ 82,250.53

WE HEREBY CERTIFY, that we have audited the books of account and record of THE STRUTHERS FURNACE COMPANY - CLEVELAND, for the period from May 1st, 1916 to December 31st, 1921, inclusive, and that, in our opinion, based upon the records examined and information obtained by us and subject to any necessary adjustment upon determination of the Company's final liability for Federal Taxes, the foregoing Summary correctly sets forth the Net Profit of the Company for the period named.

Very truly yours,

Certified Public Accountants

The Witness: I recall the conversation with Mr. Zwetsch, Vice President of A. B. Leach & Company, Inc., in January, 1922, with reference to the company's first dividend period. I asked them to loan us the money to pay it with. I told them if they did not do it we could not pay it. I think he said he would take the matter up and let me hear from him. Later on, he told us they would lend the money and for us to make our notes. I addressed him a letter on the 26th of January, 1922, with respect to that matter. The document you hand me is a copy of that letter.

Thereupon, the document above mentioned was marked Plaintiff's Exhibit 8 and received in evidence, said exhibit being as follows:

PLAINTIFF'S EXHIBIT NO. 8.

Letter, Dated Jan. 26, 1922, Struthers to Leach.

January 26th, 1922.

Mr. H. C. Zwetsch, Vice President,
A. B. Leach & Company,
Guardian Bldg.,
City.

Dear Sir:

We desire to confirm our conversation with you today as follows:

In consideration of your advancing to us the sum of $21,875.00, we have agreed that we will pay the regular dividend of one and three-quarters (1¾%) percent on the preferred stock outstanding of this Company on February 1st, 1922, which dividend is in like amount.

We hand you herewith three notes in the sum of $5000.00 each and one note in the sum of $6,875.00. All of these notes mature in four months and bear interest at the rate of 6% per annum.

It is also agreed that should we so desire, we will have the privilege of renewing these notes for a further period of sixty days at the going rate of interest at that time.

Will you kindly acknowledge receipt of this letter.

Trusting that all of the above is in accordance with your understanding of the matter, we are,

Very truly yours,

THE STRUTHERS FURNACE COMPANY,
President.

(Enclosures)

The Court: Were those notes paid, do you know, Mr. Runyon?

The Witness: Yes, sir.

The Court: Was that paid out of the bond issue money, do you know?

The Witness: Probably, Your Honor. One can't be sure about those things. We didn't segregate any money.

RE-CROSS EXAMINATION by Mr. Day.

I have in my possession the original of the copy of a letter marked Defendant's Exhibit F, which you show me. That relates to an appraisal of two mines owned by my company. Brassert made the appraisal. He valued the Wade-Helmer Mine at $1,420,000.00. Exclusive of stockpiles and inventories $710,000.00 at 50% interest.

Thereupon, the Defendant's Exhibit F was received in evidence, said exhibit being as follows:

DEFENDANT'S EXHIBIT NO. F.

Letter, Dated Mar. 30, 1922, Brassert to Runyon.

H. A. BRASSERT.

March 30, 1922.

Mr. W. C. Runyon, President.
The Struthers Furnace Co.
Cleveland, Ohio.

Dear Sir:—

I have examined the records and maps of the Wade-Helmer ore mine on the Mesaba Range, owned jointly by your Company and the Cleveland-Cliffs Iron Company.

I value this property at $1,420,000 exclusive of stock piles and inventories, or $710,000 for your 50% interest.

Very truly yours

H. A. BRASSERT.

HAB-L

Interest on the bonds was paid up to and including May, 1924. The last dividend on the preferred stock was paid in August, 1922. Dividends on the preferred stock were payable quarterly.

Mr. Wilson: In connection with Mr. Runyon's testimony, we offer in evidence copy of letter admitted to be genuine and to have been received, dated April 15, 1922, addressed to A. B. Leach & Company from the Struthers Furnace Company, purporting to send on the duplicate contract.

The document last above mentioned was marked Plaintiff's Exhibit 9 and was received in evidence, said document being as follows:

PLAINTIFF'S EXHIBIT NO. 9.

Letter, Dated April 15, 1922, Runyon to Leach.

April 15th, 1922.

A. B. Leach & Company,
Guardian Bldg.,
City.

Gentlemen:

Herewith we hand you Contract in duplicate covering your option to purchase from us $1,500,000 par amount of bonds. These contracts have been properly executed.

We also hand you herewith certified copies in duplicate of an Extract from the minutes of a meeting of the Board of Directors of this Company, authorizing this contract.

We have already handed to your Mr. Landt in New York, certified copies of our appraisals. We also handed to Mr. Landt, certified copy of our Earnings Statement in support of the figures given in Exhibit "A." We understand that you desire detailed information supporting this Earnings Statement. We will have this ready for you the forepart of the week. We believe that this will give you all of the information called for by the contract. However, if there is any further information which you desire, we will be very glad to furnish it to you as promptly as possible.

The aforesaid mentioned papers are handed to you with the understanding that we shall receive from you the Consent and Proxy covering the preferred stock which stands in your name.

Yours very truly

(Enclosures) *Vice President.*

Mr. Wilson: Mr. Runyon desires, Your Honor, to correct his testimony about the payment of the dividend. The dividend was passed in August and was not paid.

The Court: Come forward, Mr. Runyon. What is your statement now as to the dividends on preferred stock?

The Witness: The May dividend was paid and the dividend was passed, the first time we passed the dividend was August, 1922.

The Court: Then no dividends were paid except the May dividends after you had entered into the contract about this mortgage and bonds?

The Witness: I believe so.

The Court: That is you recollection?

The Witness: Yes, sir.

The Court: Your testimony may stand corrected in that respect.

Mr. Wilson: We offer in evidence a letter dated May 2, 1922, addressed to the Struthers Furnace Company, signed by A. B. Leach and Company incorporated, as Plaintiff's Exhibit 10.

Mr. Day: We object to this as immaterial.

The Court: Well, it may be received; if it relates to some other transaction or property, of course it is not material. Objection overruled and exception allowed.

The paper last above referred to marked Plaintiff's Exhibit 10, was thereupon received in evidence, said exhibit being as follows:

PLAINTIFF'S EXHIBIT NO. 10.

Letter, Dated May 2, 1922, Leach to Struthers.

A. B. LEACH & Co., INC.

105 South LaSalle Street,
Chicago, May 2, 1922.

Struthers Furnace Co.,
Citizens Bldg.,
Cleveland, Ohio.
Mr. W. C. Runyon, Jr., Vice President.

Dear Sir:

We acknowledge receipt of your favor of May 1st enclosing certified copy of appraisal of your company's real estate at Struthers, Ohio. We also are pleased to

advise you that Mr. Brassert has agreed to furnish us with an appraisal of $1,856,170 covering land, buildings and permanent improvements, this having been arrived at after consultation with our attorneys as to what might be included under the Illinois law.

We appreciate very much your cooperation.

Yours truly,

A. B. LEACH & CO., INC.

(Signed) By M. W. HANFORD.

Thereupon, a letter dated May 23 from A. B. Leach & Company to Struthers Furnace Company was marked Plaintiff's Exhibit 11 and received in evidence, said exhibit being as follows:

PLAINTIFF'S EXHIBIT NO. 11.

Letter, Dated May 23, 1922, Leach to Struthers.

A. B. LEACH & CO., INC.

Guardian Trust Bldg.,
Cleveland, Ohio,
May 23, 1922.

The Struthers Furnace Co.,
Citizens Building,
Cleveland, Ohio.

Gentlemen:

Referring to contract giving us the option to purchase $1,500,000 par amount of your Company's First Mortgage Sinking Fund Eight Per Cent Gold Bonds at 90½ plus accrued, payable in cash and preferred stock of your Company as provided in said contract and as set forth in your letter of this date to The Guardian Savings and Trust Company, whereby elect to purchase the whole of said issue of bonds at the price and upon the terms hereinabove stated and as referred to in such letter, and will take and pay for all of said bonds within one hundred and twenty-five (125) days from the date hereof.

Very truly yours,

A. B. LEACH & CO., INC.

(Signed) H. C. ZINTSCH,

Vice President.

HCZ-LEL

ROY H. DOMER, a witness called by the plaintiff, was duly sworn and testified as follows on DIRECT EXAMINATION by Mr. Henderson:

My name is Roy H. Domer. I live at Youngstown, Ohio, and am auditor for the receiver of The Struthers Furnace Company. I have been auditor for the receiver since the time of his appointment in January, 1925. Prior to that time, I was similarly employed by The Struthers Furnace Company in Cleveland and New York City. The company maintained offices in New York from about June 1, 1922, until the appointment of the receiver on January 19, 1925. During the years 1920, 1921, 1922, 1923 and 1924, I supervised the Accounting Department, and either kept myself or supervised the keeping of all books. I am familiar with the contents of the audit report marked Defendant's Exhibit C and purporting to be the audit of Ernst and Ernst of the Struthers Furnace Company dated December 31, 1921. I could not say that the report is correct without checking it in detail, but it looks to me like a copy of the original. I think I have the original with me. There is no question in my mind about the correctness of the copy. The original of which the document you show me is a copy was a correct audit report of the financial condition of the Struthers Furnace Company on December 31, 1921, as shown by the books of the company on that day. As shown by the audit report, the undivided profits or surplus profits of the company on December 31, 1921, were $82,250.53.

Q. Can you tell the Court from any books or records that you have with you as to what the operation of the company was from December 31, 1921, up until the 1st or 5th of May of 1922, so far as there being a profit or loss was concerned, and also as to the condition of the undivided profits or surplus profits as of May 1, 1922? A. Yes, sir.

Q. Will you get whatever data is necessary for you to enlighten the Court on that and tell us?

Mr. Day: I think, Your Honor, we can say this was furnished Leach and Company at their request.

The Court: This audit, you admit was furnished?

Mr. Day: Yes, we admit, the audit.

A. As I said before, the undivided profits of January 1st, was $82,250.53. We do not close the books only

once a year, and from our operating statements, cost sheets we know whether or not we have made money or lost money in any one month. During the month of January 1922, our loss was $15,401.91; February we will show had an operating loss of $16,320.93; in March, $22,-071.80; April, $22,528.85. These losses together with the preferred stock dividend paid February 1, 1922, amounting to $21,875.00, deducted from the previous undivided profits, leaves a deficit as of May 1st, of $15,-947.96, before paying the preferred dividend May 1st. After paying the May 1st dividend of $21,875.00, the undivided profits showed a deficit of $37,822.96.

Q. Can you tell us either from your record of your company or any other information that you have as to records, how the money necessary to pay the dividends on the preferred stock which was paid on February 1st, as well as the money necessary to pay the dividends which was paid on May 1st, both of 1922, was raised by the Company? A. The $21,875.00 necessary for the February 1, 1922, dividends was obtained by loan from A. B. Leach and Company on January 26, 1922. I have the notes which we gave them for the loan.

The Court: When were the notes paid back?

The Witness: The notes were paid May 26, 1922. The May 1st dividend, while we did not segregate any money received for certain purposes, yet we were borrowers, and on April 28, 1922, we borrowed $25,000.00 from the First National Bank at Pittsburgh, and on the same date paid to the Union Trust Company, Cleveland, Ohio, as agents, or as transfer agents, $21,875.00 for preferred stock dividends.

The Court: Did they make the distribution?

The Witness: They made the distribution.

Q. In answer to the Court's question, did I understand you to say it was on the 26th of May that the money borrowed from Leach and Company to pay the February dividend was paid back to Leach and Company?

The Court: That is what he did say to me.

A. May 24th. The notes were due May 26th. However, they were taken up May 24th.

Q. Can you tell us when it was that the Struthers Furnace Company, or about when it was that the Struthers Furnace Company first received any proceeds from

the sale of these bonds to A. B. Leach and Company, either from the Guardian Savings and Trust Company— A. May 24, 1922, from the Guardian Savings and Trust Company.

Q. Now, so far as current assets were concerned— that is, I mean by current assets merchandise in stock or money in bank or bills receivable—what is known as liquid assets—I will ask you to state whether or not those current assets were increased to any extent at all or any degree from December 31, 1921, until the 1st of May, 1922? That is, I mean the net current assets after all the indebtedness of the company had been deducted. A. Oh, yes, I think it was. I couldn't tell you how much, but I would say it was increased in that period.

Q. What? A. I would say that the net current assets were increased.

Q. In what way? A. By the money received from the bonds, sale of bonds.

Q. I am speaking up until the 1st of May. A. Oh, the 1st of May.

The Court: He is speaking between January 1st up until May 1st, whether there had been any increase.

The Witness: No.

The Court: Was there any substantial change in the net quick assets of the company from the statement of December 31, 1921, up until May 1st, and if so, in what direction was the change?

The Witness: It would be a reduction of the net current assets up to that time.

Q. Would you say the reduction would be at least to the extent of the losses to which you have testified and the amount required to pay dividends might total,— would the net quick assets be reduced by that amount, would you say? Or what is the fact? A. Yes, they would.

The Court: Was the last dividend paid on preferred stock May 1, 1922?

The Witness: May 1, 1922.

Q. Have there been any dividends on preferred stock paid since May 1, 1922? A. No, sir.

Q. So that we may be absolutely clear on the other question: When was the last installment of interest paid to the bondholders? A. May 1, 1924.

Q. Showing you this paper marked Plaintiff's Exhibit 12, I will ask you to state whether or not this letter was contained in the files of the Struthers Furnace Company, and has been in your custody since the appointment of a receiver and up until the present time? A. Yes, sir, it was.

Q. Do you know from whom the Struthers Furnace Company received that circular letter? A. I presume it was furnished to our Cleveland office.

Mr. Johnston: I object if the witness doesn't know.

The Court: If he doesn't know, identify it some other way. He found it among the files. That may be competent. I presume you have no direct recollection when you first saw it?

The Witness: No.

Mr. Wilson: Mr. Johnston, you say you are not advised as to whether or not this stock certificate for three thousand shares was deposited with this Court and our tender made. Do you admit the tender back and its refusal?

Mr. Johnston: Yes.

The Court: What date was the tender back made by the receiver to A. B. Leach and Company of the certificates of preferred stock?

Mr. Johnston: I think, if the Court please, the certificate ought to be put in evidence or photostatic copy.

Mr. Wilson: We have a photostatic copy.

Mr. Johnston: That's all right with us.

The Court: I am asking you to state in the stipulation when the tender of the stock was made back, and I assume counsel can agree upon that date easier than it could be gotten from the witness.

Mr. Johnston: I don't recall, Your Honor. It was sometime just prior to the filing of the suit. I can't give you the exact date.

Mr. Wilson: July 20, 1925, I think.

The Court: And whatever it is, your claim is, Mr. Henderson, is it, that after the refusal and co-incidental with the filing of this suit, you deposited that certificate for three thousand shares with the clerk?

Mr. Henderson: Yes.

The Court: Now you are proposing to put in a photostatic copy of that certificate. I will inspect the original if it is here, and photostatic copy may be substituted for the purposes of the record.

Mr. Henderson: I desire to offer in evidence Plaintiff's Exhibit 13-A, being photostatic copy of the face of the preferred stock certificate.

The Court: It is one certificate for how many shares.

Mr. Henderson: For three thousand shares. In that connection will it be conceded that this stock, this three thousand shares were turned in to the Guardian Savings and Trust Company as Trustee, and that new stock was issued by the Struthers Furnace Company to W. C. Runyon as trustee?

Mr. Johnston: Of course it is conceded that Leach and Company turned in three thousand shares of this stock from time to time under this contract to the Union Trust Company, the transfer agent—no, to the Guardian Trust. I find from the records of the transfer agent that what happened was that Leach and Company sent a total of three thousand shares in certificates to the Struthers Furnace Company, and that subsequently the Struthers Furnace Company presented those certificates and had a new certificate issued in the form of the certificate tendered here as Exhibit 13A, said exhibit being as follows:

INC

NUMBER 1307

The Struth

CA

$1,000,000 COMMON

PAR

This is to Certify That ----

is the holder of ... THRE THOUS... sh
transferable in person or by duly authorized attorney u

The holder, by acceptance of this certificate, agrees to all t
and of the Articles of Incorporation of the Company and of the Certi
thereof and Certificate of Increase of capital stock, said certifica
in the office of the Secretary of State of Ohio, December 17th,
reference is hereby made to the same effect as if the provisions th
forth in full; said Articles and Certificates provide in part that th
ferred stock shall be entitled to receive out of surplus profits div
7% per annum, payable quarterly on the first day of February, May
ber in each year, which dividends shall be cumulative from the qu
ment date next preceding the date of the original issue of each shar
dividends shall be paid to the holders of the common stock, and
and upon any voluntary liquidation, dissolution or winding up of t
any voluntary distribution of assets other than by way of dividend
or redemption of preferred stock, to receive $105 per share, or
liquidation, dissolution or winding up, the par value of such stock,
accrued and unpaid dividends thereon before any amount shall be
stock; that the holders of the common stock are entitled to all
assets; that the preferred stock shall not be entitled to any subs
stock hereafter issued by the Company, whether common or pref
or any part of the preferred stock may be called for redemption
Company upon not less than thirty days' prior notice at $105 per
accrued and accumulated dividends thereon; that the Company
beginning January 1, 1922, and during each year beginning Jan
aside out of surplus profits and apply to the redemption and retirem
on or before March 1 of each year, beginning March 1, 1922, an a
the first five year period beginning January 1, 1922, of not less than
year of the second five year period, beginning January 1, 1927,
per cent., and for each year thereafter, beginning January 1, 1932,

IN WITNESS WHEREOF

signed by its duly au

Secretary

Registered
THE GUARDIAN SAVINGS AND TRUST COMPANY,
Registrar
By
Assistant Secretary

INCORPORATED UNDER THE LAWS OF THE
STATE OF OHIO

NUMBER 1307 PREFERRED ---3000--- SHARES

The Struthers Furnace Company

CAPITAL STOCK $2,250,000
DIVIDED INTO
$1,000,000 COMMON STOCK $1,250,000 PREFERRED STOCK
PAR VALUE OF SHARES $100 EACH

This is to Certify That -----W. C. RUNYON, TRUSTEE-----

is the holder of THREE THOUSAND shares of the 7% cumulative Preferred Stock of THE STRUTHERS FURNACE COMPANY, transferable in person or by duly authorized attorney upon the surrender of this certificate properly endorsed.

The holder, by acceptance of this certificate, agrees to all the provisions hereof and of the Articles of Incorporation of the Company and of the Certificate of Amendment thereof and Certificate of Increase of capital stock, said certificates having been filed in the office of the Secretary of State of Ohio, December 17th, 1919, to all of which reference is hereby made to the same effect as if the provisions thereof were herein set forth in full; said Articles and Certificates provide in part that the holders of the preferred stock shall be entitled to receive out of surplus profits dividends at the rate of 7% per annum, payable quarterly on the first day of February, May, August and November in each year, which dividends shall be cumulative from the quarterly dividend payment date next preceding the date of the original issue of each share thereof, before any dividends shall be paid to the holders of the common stock, and no other dividends, and upon any voluntary liquidation, dissolution or winding up of the Company or upon any voluntary distribution of assets other than by way of dividends from surplus profits or redemption of preferred stock, to receive $105 per share, or upon any involuntary liquidation, dissolution or winding up, the par value of such stock, in each case plus all accrued and unpaid dividends thereon before any amount shall be paid to the common stock; that the holders of the common stock are entitled to all other dividends and assets; that the preferred stock shall not be entitled to any subscription rights in any stock hereafter issued by the Company, whether common or preferred; that the whole or any part of the preferred stock may be called for redemption at any time by the Company upon not less than thirty days' prior notice at $105 per share plus all unpaid, accrued and accumulated dividends thereon; that the Company shall, during the year beginning January 1, 1922, and during each year beginning January 1 thereafter, set aside out of surplus profits and apply to the redemption and retirement of preferred stock on or before March 1 of each year, beginning March 1, 1922, an amount in each year of the first five year period beginning January 1, 1922, of not less than ten per cent., for each year of the second five year period, beginning January 1, 1927, not less than fifteen per cent., and for each year thereafter, beginning January 1, 1932, not less than twenty per cent. of the net surplus profits of the Company for the preceding year remaining after the payment of preferred dividends and all taxes, including any state and federal income or excess profits tax, such redemption and retirement to be (1) by purchase in the market at not exceeding the redemption price, or (2) by calls for redemption; that so long as any of the preferred stock remains outstanding the Company shall maintain net quick assets in an amount not less than 100% of the par value of the preferred stock at such time outstanding and shall declare or pay no dividend to the holders of the common stock unless each and all of the accrued quarterly preferred dividends on the preferred stock shall have been paid, or the money to pay the same be set aside for that purpose, and unless all requirements for the redemption or retirement of the preferred stock shall have been complied with, and unless the surplus profits of the Company applicable to dividends on preferred stock for the twelve months preceding shall not have been less than one and one-half times said preferred stock requirements, and unless also the net quick assets of the Company are at such time at least equal to 100% of the outstanding preferred stock and are not reduced below such amount by the payment of such dividend upon common stock; that the preferred stock shall have no voting power except (a) in the event of default in the payment of four consecutive quarterly dividend installments upon the preferred stock and upon and during such default the preferred stock shall have equal voting rights with the common stock, share for share, and (b) no mortgage or other lien other than a purchase money mortgage shall be placed upon the real estate, plant or equipment of the Company, nor shall any bonds, debentures, notes or other similar indebtedness having a maturity beyond one year, be issued or created or guaranteed, nor shall any additional preferred stock, having priority over or parity with this issue of preferred stock, be issued except in each case with the affirmative vote or consent in writing of the holders of three-fourths in amount of the preferred stock of this issue then outstanding.

This certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

Countersigned JUL 13 1922 THE STRUTHERS FURNACE COMPANY TRANSFER AGENT
By [signature] ASSISTANT SECRETARY

IN WITNESS WHEREOF, the Company has caused its corporate seal to be hereunto affixed and this certificate to be signed by its duly authorized officers this 13th day of July 1922

[signature] Secretary

[signature] V. President

Youngstown, Ohio. May 13, 1925

For full value received I hereby sell, assign and transfer unto
three thousand shares of the preferred capital Stock represented by the
within Certificate, and do hereby irrevocably appoint
to transfer the said stock on the books of the within named Company with
full power of substitution in the premises. Dated May 13th, 1925,
The Struthers Furnace Co.

WITNESSETH:

Hugh W. Faust
Receiver, The Struthers Furnace Co.

FOR VALUE RECEIVED I hereby sell, assign and transfer unto

The Stanhope Furnace Co.

Three thousand shares

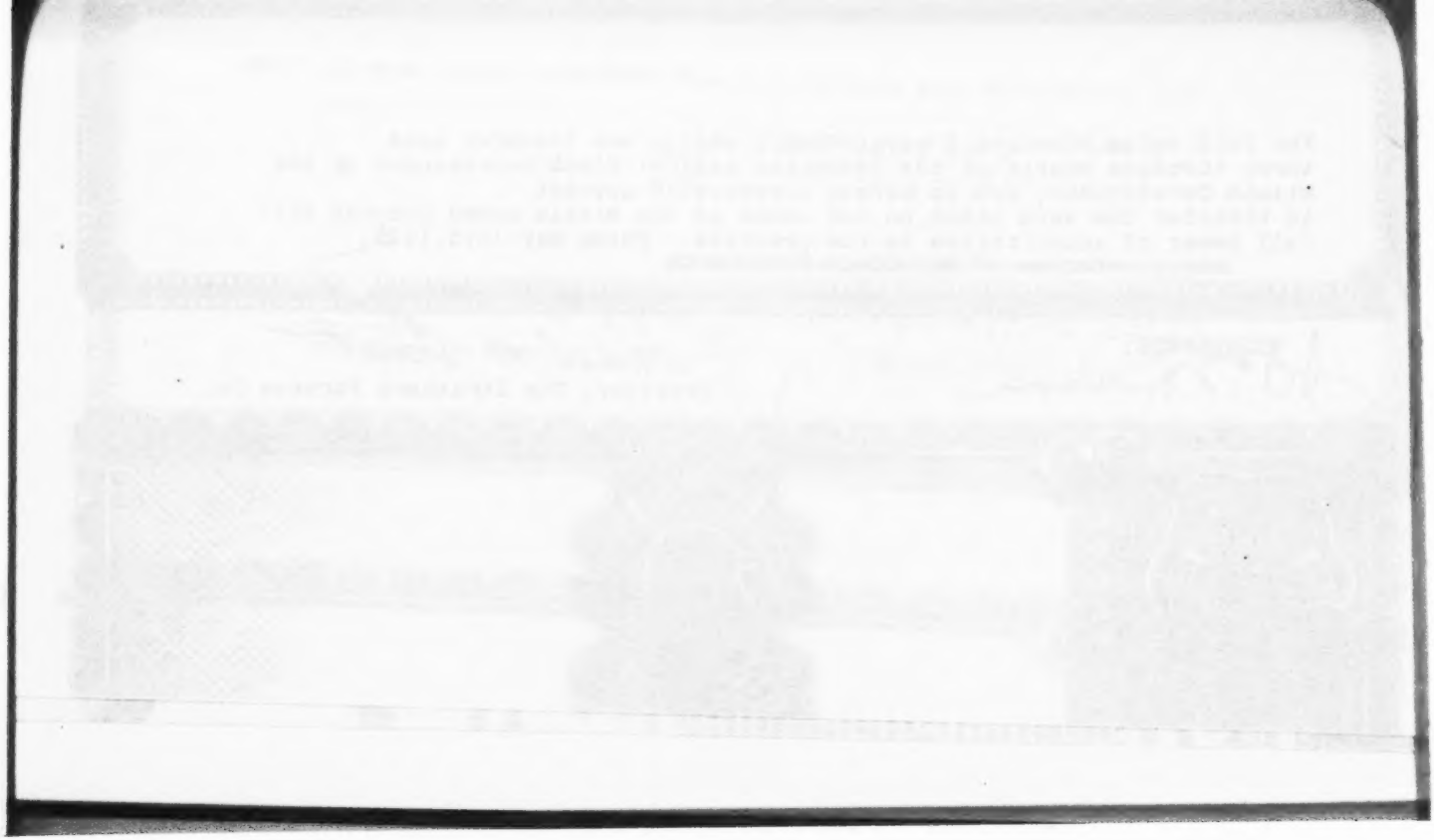
of the Preferred Capital Stock represented by the within certificate, and do hereby irrevocably constitute and appoint attorney to transfer the said stock on the books of the within named Company, with full power of substitution in the premises.

Dated Jany 20. 1923

W. A. Runyon Trustee

In presence of

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement or any change whatever.



Q. Mr. Domer, are you familiar with the accounting that was made by the Guardian Savings and Trust Company or by A. B. Leach and Company through the Guardian Savings and Trust Company for the purchase of these bonds? A. Yes, sir.

Q. Can you give us that as to the manner in which the purchase price was paid, either in stock or cash?

Mr. Johnston: My understanding is this was by the Guardian Savings and Trust Company, Your Honor.

The Court: Yes, the money was paid in to the Guardian Savings and Trust Company.

A. The Guardian Savings and Trust Company were trustees. They handled the whole transaction.

The Court: We are only interested in the accounting on the $450,000.00 of bonds which was to be paid for in part by the surrender of three thousand shares of preferred stock. Have you that separated in your account?

The Witness: Yes, sir. And there was preferred dividend accrued, preferred dividend paid to A. B. Leach and Company in addition to the $85.00 per share for the preferred stock.

The Court: Accrued between what period?

The Witness: From May 1st, up until the various dates that this stock was taken up.

The Court: And do you know how much the amount was accrued? I mean the aggregate that you paid them.

The Witness: $1513.94.

Q. So far as you know Mr. Domer, was there any action ever taken by the board of directors with reference to declaring a dividend for the period, or any period or any quarter subsequent to May 1, 1922? A. No, sir.

The Court: There was no action taken to declare a dividend; there was an action taken to pass a dividend?

The Witness: There may have been an action to pass a dividend; not paying.

CROSS EXAMINATION by Mr. Johnston.

The figures with reference to the amount of accrued dividend that was allowed to A. B. Leach and Company upon this stock were copied from my own records, which were copies from the Guardian Savings and Trust Company statement. I personally did not handle the distribution of any of that money of the A. B. Leach Company. Neither did the Struthers Furnace Company. That was all done by the Guardian Savings and Trust Company. I think the Struthers Furnace Company gave the Guardian Savings and Trust Company instructions with reference to how this distribution was to be made. I recall that there was a letter on the subject written by the Struthers Furnace Company.

RE-DIRECT EXAMINATION by Mr. Henderson.

With reference to the papers marked Plaintiff's Exhibits 14A, B and C, I know that copies of the letter marked 14A, enclosing the consent in proxy B and followed up by the letter of April 20, went to the preferred stockholders of the Struthers Furnace Company. They were mailed. I have with me the consents of all the preferred stockholders who signed consents to the making of this bond issue. They are all in the same form as the consent which is marked B and attached to Exhibit 14A. I made a tabulation as to how many shares of the preferred stock consented to the bond issue in addition to the 3000 shares then held by A. B. Leach & Company. I have not the tabulation here. The paper you hand me marked Plaintiff's Exhibit 15 is a correct tabulation of the total number of shares for which consent was given to this bond issue. The total number is 9911 shares. Of that number, there were 9742 consents received up to the time of the actual passage of the resolution for the bond issue. The latter amount includes the 3014 shares then held by A. B. Leach & Company.

Thereupon Plaintiff's Exhibits 14A, 14B and 14C were received in evidence, said exhibits being, respectively, as follows:

PLAINTIFF'S EXHIBIT NO. 14-A.

Letter of April 3, 1922 to Preferred Stockholders.

THE STRUTHERS FURNACE COMPANY,
CITIZENS BUILDING,
CLEVELAND, OHIO.

April 3, 1922.

To the Preferred Stockholders

As you probably are aware, the year 1921 was a year of comparative inactivity in the Iron and Steel business. Production dropped to the lowest point in many years in the industry. The Company operated for twenty-one days in January 1921, by which time sufficient iron had been manufactured to fill all sales contracts on the books. Operations then ceased, and examination of the furnace showed that it would be necessary to reline before again resuming the manufacture of pig iron. We accordingly proceeded with the relining of the furnace, and the making of all necessary repairs, and today the plant is in a high state of efficiency.

Owing to the fact that nearly all consumers of iron were in the position of having either large stocks of iron on hand, or contracts calling for the delivery of iron, there was no market for our product throughout the year, except at prices which would have involved far greater losses than we sustained by remaining idle. Fixed charges have been cut to an absolute minimum, and only the nucleus of an organization maintained. By the nucleus of an organization we mean only heads of departments who have been with the Company for a long period of time, and are thoroughly experienced in their respective duties. If the proposed coal strike is of short duration, and the Interstate Commerce Commission renders its decision on the question of freight rates, we will resume operations in the near future.

At the time when we ceased operations, this Company had on hand a large inventory of iron ore and pig iron. The pig iron has been shipped on contracts. The iron ore has been marked down to present market levels, and today stands on the books at approximately $1,390,000.00. This inventory has naturally made it necessary for the Company to borrow a considerable amount of money, the sum of our floating indebtedness at this time being approximately $1,050,000.00. It is deemed advisable by the Directors of the Company to

authorize, issue, and dispose of an issue of not exceeding $1,500,000.00 par amount of bonds secured by mortgage upon the real estate, plant and equipment of the Company, to provide funds for the payment of floating indebtedness, additional working capital, and for other corporate purposes. You are aware, of course, that all dividends on the preferred stock have been paid to date. It is because of our desire to maintain a strong financial position that we wish to fund our present floating indebtedness. We have discussed the matter with A. B. Leach & Company, Inc., of New York, who sold our preferred stock, and the proposed financing carries with it their unqualified approval. As it is necessary for the Directors to act in the near future, we request that you fill in, sign, and return promptly the enclosed Consent and Proxy.

Yours very truly,

THE STRUTHERS FURNACE COMPANY,
W. C. RUNYON,
President.

PLAINTIFF'S EXHIBIT 14-B.

Consent and Proxy.

THE STRUTHERS FURNACE COMPANY,

Consent and Proxy.

The undersigned, a stockholder of The Struthers Furnace Company, hereby waives any and all notice required by the Company regulations or by law of a special meeting of the stockholders of said Company to be held at the office of the Company, Cleveland, Ohio, on a day and time to be hereafter fixed by the Board of Directors, for the purpose of authorizing an issue of First Mortgage Bonds of the Company in a sum not to exceed $1,500,000.00 par amount, the payment of said bonds to be secured by a mortgage conveying the real estate, plant and equipment of the Company.

The undersigned also appoints W. C. Runyon, W. C. Runyon, Jr. and George A. Coulton, or any one or more of them with full power in each to substitute an attorney and proxy in his place and stead, true and lawful attorneys and proxies of the undersigned to appear and to vote, consent and act in respect to all stock of said Company standing in the name of the under-

signed at said special meeting of stockholders or any adjournment thereof, on any and all questions that may be presented at said meeting, hereby ratifying and confirming all acts of said proxies or substitutes.

A majority of said proxies present at said meeting or any adjournment thereof may exercise the foregoing powers, and if only one proxy is present he may exercise the powers vested in said proxies.

The undersigned hereby also consents and agrees that said Company by and through its directors and officers may authorize, issue and dispose of an issue of bonds of the Company not to exceed $1,500,000.00 in total par amount, bearing interest at not exceeding 8% per annum, payable semi-annually, maturing at not exceeding twenty years from the date thereof, and secure the payment of principal and interest of said bonds by a mortgage upon the real estate, plant and equipment of the Company, said bonds and mortgage to contain such terms and conditions and said bonds to be sold at such prices and for such purposes, all as may be determined by resolutions of the Board of Directors of the Company.

WITNESS the name of the undersigned April, .., 1922.

.....

Signed in the presence of:

.....

PLAINTIFF'S EXHIBIT NO. 14-C.

Letter of April 20, 1922 to Preferred Stockholders.

THE STRUTHERS FURNACE COMPANY,
CITIZENS BUILDING,
CLEVELAND, OHIO.

April 20, 1922.

To the Preferred Stockholders:

Under date of April 3rd, we wrote you relative to the authorization of an issue of bonds secured by mortgage on the fixed assets of this Company. A consent and Proxy was enclosed with that letter, but to date we have not received a reply from you.

The rate at which the consents have been coming in from our Preferred Stockholders has been most gratifying and would seem to indicate the realization, by the Stockholders, that their interests will be conserved

and strengthened by the proposed financing. We are, however, desirous of hearing from as large a proportion of our Stockholders as possible and feel that, probably, your failure to execute and return the Proxy sent you, is due to an oversight.

We are, therefore, writing you again and urgently request that you sign the Proxy, have it witnessed, and return to us at once. As it is possible you may have mislaid the Proxy sent you recently, we are enclosing herewith a copy of same.

Your prompt attention will be appreciated.

Very truly yours,

THE STRUTHERS FURNACE COMPANY,
(Signed) W. C. RUNYON,
President.

WCR-KFL

RE-CROSS EXAMINATION by Mr. Johnston:

The balance sheet shown upon the audit of Ernst and Ernst (Defendant's Exhibit C), about which I testified, is a balance sheet made up prior to the bond issue. The balance sheet was also made up prior to the appraisal of the properties by Freyn-Brassert and Company or Brassert and by Lyons. The balance sheet merely reflects what was shown on the books before these appraisals were made. There was a surplus of $82,-250.53 as of December 31, 1921, in addition to the preferred stock which was taken at par ($1,250,000.00) and common which was taken at $1,000,000.00. I testified that the quick asset position of the company did not improve between January 1, 1922, and May 1, 1922, but that on the contrary it was impaired. I could not state whether there was any increase in inventory during that period. What I meant to say by my previous statement with respect to the impairment of net quick assets was that the loss from operations naturally impaired the net quick assets during the period above mentioned. There could not have been an increase in inventory during said period for the reason that we were not then operating. The plant was shut down. There was during that period no perceptible increase of accounts receivable. If they increased the inventory they would decrease correspondingly the property. I have not made any investigation as to whether or not the other elements

which entered into the question of amount of net quick assets were affected. I have assumed that because there was an operating loss in the sum heretofore stated that said loss resulted in an impairment of net quick assets to the full amount of the operating loss. I know that subsequent to December 31, 1921, and in connection with the proposed bond issue, Ernst and Ernst made a new balance sheet reflecting the condition of the company after giving effect to the bond issue and to the appraisals. I have not seen the balance sheet made by Ernst and Ernst. The document you show me (Plaintiff's Exhibit G for identification) is a copy of the balance sheet that was prepared after giving effect to the refinancing and the appraisals. It is approximately correct, I suppose. I do not recognize the balance sheet.

Q. Well, did you make up a balance sheet of the affairs of the Struthers Furnace Company after the bond issue and after the appraisals? A. Well, you must understand the only balance sheet we had was December 31, 1921; there was nothing prepared from that date until December 31, 1922, that was actual; it was all based on assumptions.

Q. But after the bond issue you of course took the bond issue into account in all your statements? A. No, we didn't until December 31, 1922.

Q. And you didn't issue any statements, you mean, until December? A. We didn't put it into our books until the end of the year; that is, the appraisal.

Q. The bonds were put on the books and were issued and you received the money? A. Yes.

Q. It was sometime in May or June of 1922? A. May and June.

Q. The appraisal figures you didn't actually, you say, set upon your books until the close of the year, until the time you would ordinarily put out your balance sheets for the year? A. Yes.

Q. Then you did place those figures on your books? A. Yes.

Q. Did you adopt the figures of Mr. Brassert upon the plant? A. Yes.

Q. And upon the valuation of your interest in the Wade-Helmer mine? A. Not that.

Q. Didn't adopt that? A. No.

Q. Did you adopt the figures of Mr. Lyon on the real estate? A. Yes.

Q. How did you depart from his appraisal on the Wade-Helmer mine? A. We have a complicated system of accounting of our Wade-Helmer mine; owning a half interest, our books must reflect that half interest, and we are compelled to keep our books to reflect that half interest on the statements furnished by the other half owner; therefore we thought we had better not monkey with it.

Q. That is, you mean you left the valuation as it was? A. Left the valuation as it was. However, on our balance sheets we would make a notation that its value was appraised at $710,000.00 by Mr. Brassert.

Q. And you did make such a notation upon your subsequent balance sheets? A. Yes, sir.

Q. Do you recall whether or not there was furnished to Leach and Company, or prepared at least for the purposes of this bond issue, a statement showing the earnings of the Struthers Furnace Company from the period May 1, 1911, to December 31, 1921? A. Yes, sir, I did.

Q. Will you look at this statement which has heretofore been marked Defendant's Exhibit D, but is not in evidence, and tell us whether or not that is the statement that was so prepared? A. This appears to be a copy of the statement so prepared.

The Court: Was the original prepared under your supervision?

The Witness: No, it was prepared entirely by Ernst and Ernst from company's reports.

Q. However, you were cognizant of the fact that it was being prepared? A. Yes.

Q. It was brought to your attention at the time? A. Yes.

Q. This report was prepared sometime in the spring of 1922? A. Yes, sir.

Q. At least it was—your answer to that question was yes? A. My answer was yes.

Q. And this purports to show the profits for the year 1921 complete, December 31, so it must have been after that date? A. Yes, sir.

Q. Mr. Domer, I will ask you this question, whether the Struthers Furnace Company gave instructions to the Guardian Savings and Trust Company with respect to the manner of handling these bonds? I will ask you to look at that letter bearing date May 24, 1922, and state if you know whether or not the original of that was sent by the Struthers Furnace Company to the Guardian Savings and Trust Company? A. Yes, sir, that is a copy of the letter.

Mr. Johnston: We will offer this in evidence as Defendant's Exhibit H.

The letter last above referred to, marked Defendant's Exhibit H, was thereupon received in evidence, and is as follows:

DEFENDANT'S EXHIBIT NO. H.

Letter, Dated May 24, 1922, Struthers Co. to Guardian Trust Co.

THE STRUTHERS FURNACE COMPANY
MANUFACTURERS OF PIG IRON,
CITIZENS BUILDING,
Cleveland, Ohio.

May 24, 1922.

The Guardian Savings & Trust Co.,
Cleveland, Ohio.

Gentlemen:

Referring to The Struthers Furnace Company issue of $1,500,000 par value of First Mortgage Sinking Fund Eight Per Cent Gold Bonds, dated May 1, 1922, secured by a First Mortgage Trust Deed under which you are Trustee, which mortgage has been filed for record as a mortgage of real property in the office of the Recorder of Mahoning County, Ohio, all of which bonds have been signed by the Company and delivered to you, will you please authenticate said bonds and deliver the same as hereinafter stated.

All of said bonds have been sold by the Company to A. B. Leach & Co., Inc., at the price of 90½ plus accrued interest and the first $800,000 par value of said bonds to be taken and paid for by A. B. Leach & Co., Inc., are payable in cash upon delivery at the price aforesaid. The next $450,000 par value of bonds taken by A. B. Leach & Co., Inc., are to be paid for by A. B. Leach & Co., Inc.,

on the following basis: for every $1500.00 par value of bonds at the price of 90½ plus accrued interest, there shall be delivered 10 shares of The Struthers Furnace Company preferred stock at $85.00 per share and accrued dividend from May 1, 1922, being the last dividend paying date, at 7%, and the balance of said purchase price is to be paid in cash.

The remainder of said issue of bonds, to-wit: $250,000 par value thereof are to be paid for by A. B. Leach & Co., Inc., at the price of 90½ plus accrued interest in cash upon delivery.

All certificates of preferred stock of this Company, delivered by A. B. Leach & Co., Inc., in pursuance of the foregoing, are to be duly endorsed in blank and witnessed in the form complying with the requirements of the Cleveland Stock Exchange in reference to the delivery of stock certificates.

A. B. Leach & Co., Inc., may take up and pay for said bonds as aforesaid at any time within one hundred and twenty-five (125) days from the date hereof.

Will you please make delivery of said bonds to the order of A. B. Leach & Co., Inc., as above, upon receipt for our account of cash and preferred stock as above stated.

Very truly yours,

THE STRUTHERS FURNACE COMPANY
By (Signed) N. C. RUNYON, JR.,
Vice President.

Q. Will you look at Exhibit G, which is the balance sheet I showed you a short time ago, and which you stated, I believe, is approximately correct, and will you state to the Court what the net quick assets are as shown from that balance sheet?

The Court: That is, after taking into account the receipts from the bonds.

A. Yes, sir. They are $1,542,223.39.

The Court: That increased them over the former statement of December 31st, by what amount?

The Witness: Well, I haven't that.

The Court: The audit shows net quick assets in what amount, according to your reading of it?

The Witness: $434,442.18.

The Court: What items do you count as net quick assets?

The Witness: Cash, United States Government Securities, accounts receivable, inventory, life insurance, cash surrender value. However, that is only the debit side. Do you want to know what I consider as the credit against the asset to make it net?

The Court: All right.

The Witness: Notes payable for borrowed money, accounts payable and accrued accounts, such as taxes.

The Court: The funded debt like this bond issue you would not count against the quick assets?

The Witness: No, sir.

Q. That goes against the quick assets, plant, equipment and real estate? A. Yes, sir.

RE-DIRECT EXAMINATION by Mr. Henderson.

Q. In determining what you have made reference heretofore as net quick assets, have you deducted from what we might refer to as gross quick assets, all of the indebtedness of the company? A. No, sir.

Q. Have you deducted all of the indebtedness of the company except the amounts owing on the bonds? A. We haven't deducted the capital stock; we haven't deducted any other company account.

Q. That is, any other company account of some transaction between the Struthers Furnace Company and the Struthers Coal and Coke Company? A. Yes.

Q. What was the nature of that indebtedness? A. It was probably at that time advanced money from one to the other.

Q. But it did appear on the books of the company as a charge against the Struthers Furnace Company? A. As a credit to the Struthers Coal and Coke Company, and against that we would have the value of our stock on the debit side.

Q. What was the amount of that? A. I didn't include that on either side because we didn't consider it very much of a quick asset.

Q. What other indebtedness did you include, or rather deduct? A. All of the accounts and notes payable, accrued taxes. That's all there was.

Mr. Henderson: That's all.

RE-CROSS EXAMINATION OF ROY H. DOMER
by Mr. Johnston.

Q. Mr. Domer, there is one more line of questions I would like to ask you, please. You are familiar, as the auditor for the receiver, with the list of unsecured creditors of the Struthers Furnace Company as of the date of the appointment of the receiver, are you not? A. Yes, sir.

Q. Did you prepare a list of such unsecured creditors showing the dates that these respective claims against the Struthers Furnace Company were incurred? A. Yes, sir.

Q. May I show you this statement and ask you whether that was prepared either by you or under your direction for the purpose of showing those facts? (Handing to witness) A. Yes, sir.

Q. The pen figures following the name of the creditor I take it represent the date upon which that particular person or company or partnership became a creditor? A. Yes, as far as the record shows.

Q. That is to say, when the debt was incurred? A. Yes.

Q. And these figures are taken from the records of the Struthers Furnace Company? A. Yes, sir.

Mr. Johnston: We offer this statement in evidence as Defendant's Exhibit I.

The document last above referred to, marked Defendant's Exhibit I, was thereupon received in evidence, and is as follows:

UNSECURED CREDITORS

Accounts Payable	Assumed	Formally Claimed	Contra Account	Total Net
American Heat Economy Bureau 6/28/24		$4912.50	$	$4912.50
Browning Company 11/24/24		58.15	1025.00	966.85
Burroughs Adding Machine Co. 12/8/24		4.99		4.99
Corlies Macy & Company 12/31/24		6.00		6.00
Cleveland-Cliffs Iron Co.	$36948.61 - 10/1/24 To 1/19/25		6695.34	30253.27
Crescent Towel Supply Co. 1/1/25		5.30		5.30
J. A. & D. P. Cooper Co. 1/1/25	10.00			10.00
Dittmar & Benson 12/31/24		.60		.60
Ernst & Ernst 6/30/24		9249.02		9249.02
Pollansbee Bros. Co. 12/26/24	26.00			26.00
H. Frank Company 12/27/24	47.15			47.15
Great Bear Spring Co. 1/1/25		2.00		2.00
Harbison-Walker Refractories Co. 7/1/24		1687.50		1687.50
C. B. Harris 1/8/25		1.45		1.45
Independent Warehouses, Inc. 11/29/24 To 1/19/25	4437.11			4437.11
Iron Trade Review 12/25	6.00			6.00
Knickerbocker Ice Co. 1/1/25		3.78		3.78
Mahoning Valley Water Co. 12/26/24		3.74		3.74
Malona-Hull Hardware Co. 12/27/24		4.26		4.26
J. C. McHenry 12/23/24		3.00		3.00
Monongahela Railway Co. 12/19/24	21.99			21.99
New York Telephone Co. DEC-30/24 To 1/20/25		92.45		92.45
Penna-Ohio Power & Lt. Co. 11/11/24 To 1/19/25	319.51			319.51
Pgh. & Lake Erie R. R. Co. 7/1/24 To 1/19/25	4116.21		1886.86	2229.35
Redding & Company 12/11/24		26.30		26.30
Stambaugh-Thompson Co. 1/8/25		3.45		3.45
Standard Oil Co. 1/7/25		2.85		2.25
Traffic Club of Pgh. 12/18/24	22.00			22.00
E. H. Treudley & Co. 12/1/24		1.00		1.00
Tolles, Hogsett, Ginn & Morley 7/24/23 To 12/31/24		3598.18		3598.18
Wm. A. Ullman 1/10/25		176.00		176.00
Union Trust Co. 1/1 To 12/31/24		300.00		300.00
Western Elec. Co., Inc. 12/6/24		6.50		6.50
Western Union Telegraph Co. 1/7 To 1/19/25		21.73		21.73
Wheeler Mineral Spring Co. 12/1/24		3.00		3.00
Guardian Svg. & Tr. Co., (Fed. income tax on bonds) YEAR 1924	649.91			649.91
Unclaimed Wages 1910 To 1920	107.19			107.19
Alice R. Hart, Trustee 4/25/19	44.26			44.26
W. C. Runyon, Jr., Trustee 5/25/20	15.06			15.06
	$4671.00	$20173.15	$9607.20	($966.85 (58303.80

Notes Payable			
Davidson Ore Mining Co. 4/2/23	$81,150.16		$124,303.23
Marquette Ore Co. 1/22/24	43,153.07		2,500.00
The Struthers Coal & Coke Co. 11/22/24			
Accrued Accounts - To 1/19/25			
Bond Interest 11/1/24	86,333.33		
Taxes-real estate & personal 1/1/24	37,985.66		
Interest on notes payable (secured Notes) 11/1/24	23,355.87		
Interest on notes payable (unsecured notes) 11/1/24	586.18		
Wages 1/1/25	2,237.00		150,652.06
Miscellaneous 1/1/25	154.02		
		Total	$333,652.06 966.85

Defendant's Exhibit No. [illegible]

Mr. Henderson: Are these all creditors subsequent to the date of the bond issue, Mr. Domer, as shown on this paper?

Mr. Johnston: Supposed to be all the creditors.

The Court: I understood him to say a list of the creditors at the time the receiver was appointed, and that the figures in pen were the dates when those debts had been contracted for the liability.

The Witness: That is correct.

WALTER C. RUNYON was recalled by plaintiff for further examination and testified as follows on DIRECT EXAMINATION by Mr. Wilson.

The Struthers Furnace Company did not give any notice that I know of to preferred or common stockholders of the option which had been given to Leach and Company on April 15 to exchange preferred stock for bonds. No offer was made by the Struthers Furnace Company to any other preferred stockholders to exchange bonds for their stock.

CROSS EXAMINATION by Mr. Day.

I attended a meeting of the common stockholders on May 5, 1922. There was presented at the meeting a contract between Leach and Company dated April 15, 1922, with a modification covering the sale of bonds above mentioned. That contract was considered and upon motion duly made, seconded and unanimously carried approved by the common stockholders at that meeting.

Mr. Henderson: I desire to offer in evidence a document the authenticity of which is conceded, marked Plaintiff's Exhibit 16; a letter dated December 5, 1921, from A. B. Leach and Company to Walter C. Runyon, Junior, vice-president, Struthers Furnace Company, marked Plaintiff's Exhibit 17.

Mr. Johnston: Well, I think it is immaterial and incompetent, and I object to it for that reason, since it refers to the negotiations which Mr. Runyon has said were terminated subsequently and then resumed later.

The Court: Oh, I think it is immaterial. The objection to Exhibit 17 is sustained. Exhibit 16 may be admitted.

Thereupon, Plaintiff's Exhibit 16 was received in evidence, said exhibit being as follows:

PLAINTIFF'S EXHIBIT NO. 16.

Consent and Proxy.

THE STRUTHERS FURNACE COMPANY

Consent and Proxy.

The undersigned, a stockholder of The Struthers Furnace Company, hereby waives any and all notice required by the Company regulations or by law of a special meeting of the stockholders of said Company to be held at the office of the Company, Cleveland, Ohio, on a day and time to be hereafter fixed by the Board of Directors, for the purpose of authorizing an issue of First Mortgage Bonds of the Company in a sum not to exceed $1,500,000 par amount, the payment of said bonds to be secured by a mortgage conveying the real estate, plant and equipment of the Company.

The undersigned also appoints W. C. Runyon, W. C. Runyon, Jr., and George A. Coulton, or any one or more of them with full power in each to substitute an attorney and proxy in his place and stead, true and lawful attorneys and proxies of the undersigned to appear and to vote, consent and act in respect to all stock of said Company standing in the name of the undersigned at said special meeting of stockholders or any adjournment thereof, on any and all questions that may be presented at said meeting, hereby ratifying and confirming all acts of said proxies or substitutes.

A majority of said proxies present at said meeting or any adjournment thereof may exercise the foregoing powers, and if only one proxy is present he may exercise the powers vested in said proxies.

The undersigned hereby also consents and agrees that said Company by and through its directors and officers may authorize, issue and dispose of an issue of bonds of the Company not to exceed $1,500,000 in total par amount, bearing interest at not exceeding 8% per annum, payable semi-annually, maturing at not exceeding twenty years from the date thereof, and secure the payment of principal and interest of said bonds by a mortgage upon the real estate, plant and equipment of the Company, said bonds and mortgage to contain such terms and conditions and said bonds to be sold at such prices and for such purposes, all as may be determined by resolution of the Board of Directors of the Company.

WITNESS the name of the undersigned April 15, 1922.

(Signed) A. B. LEACH & Co. INC.
H. C. ZINTSCH,
Vice Pres.

Signed in the presence of:
F. M. LAPP.

Plaintiff's Exhibit 17, which was not admitted in evidence, is attached as an appendix to this statement of evidence.

Plaintiff called as a witness in his behalf HORACE C. ZWETSCH, who, being first duly sworn, testified as follows on DIRECT EXAMINATION by Mr. Henderson:

My name is Horace C. Zwetsch. My business at the present time is investment banking. I am associated with A. M. Lambert and Company, 44 Pine Street, New York. In April, 1922, I was associated with A. B. Leach & Company in the capacity of Vice-President, with offices in the Guardian Building in Cleveland. Referring to the paper you hand me marked Plaintiff's Exhibit 12, I do not recall ever having seen it before. The document is on a letterhead of A. B. Leach & Company, Inc., of Cleveland, but it was never sent out from this office. I do not know whether it was sent out from any of the other offices of A. B. Leach and Company. I know that the document was not sent out from this office because all our letters are initialed. The document is the form of a circular letter. Attached to the letter are the initials CBC, possibly the initials of Mr. Campbell, whose initials are CBC. His office was located in New York City. He was the Vice-President of A. B. Leach and Company.

Mr. Henderson: I desire to offer in evidence Plaintiff's Exhibit 12.

Mr. Johnston: This is the one counsel questioned about. It looks as if it had been sent out, but we have no recollection of it or cannot find anybody who did. It apparently was not sent out from the offices of Leach and Company. I mean to say it was not actually prepared and mailed from their offices. It is on their letterhead.

The Court: Oh, well, I don't see that it adds anything to the case or takes from it. It may be received.

Said document is as follows:

PLAINTIFF'S EXHIBIT NO. 12.

Letter to Stockholders, Struthers Furnace Co., April 3, 1922.

A. B. LEACH & Co. INC.

Guardian Trust Bldg.,
Cleveland, Ohio,
April 3, 1922.

To the Preferred Stockholders of Struthers Furnace Company.

You have recently received from the Struthers Furnace Company a blank proxy to sign authorizing the issuance of $1,500,000 8% 20 Year Sinking Fund Gold Bonds.

We have made a very exhaustive examination of the situation covering several months. The property has been only recently appraised and audits completed. It is our judgment that the interests of the Preferred Stockholders will be conserved by the Company paying its bank loans and floating indebtedness with an obligation extending over a period of years and be left sufficient working capital to operate.

It is our firm belief that this refinancing puts this Company in a very much stronger financial position than it has ever been and will enable it to continue its operations practically independent of bank loans and floating debts.

We unhesitatingly recommend that you give your consent.

Very truly yours,
A. B. LEACH & Co., INC.

CBC.T

Mr. Wilson: A certain issue is joined in the answer and reply, the answer pleading an estoppel, and the reply alleging certain facts growing out of the commencement of a suit here by a preferred stockholder in November of 1922. I am not sure but this evidence should be introduced by the plaintiff in rebuttal, or it may be introduced in defense here.

The Court: Well, I don't know, it depends on the state of your pleadings.

Mr. Wilson: They plead that interest was paid on these bonds up to a certain time. They have proven that, and they aver that nothing was done by anybody to protest, that is, nothing was done by the directors of the company or by the company to attack the validity

Mr. Wilson: No, there was not, but a suit was commenced by a preferred stockholder who was represented by this receiver, attacking the validity of that transfer, in November, about the time of the first payment of interest on these bonds.

The Court: Well, did it go to judgment?

Mr. Wilson: It did not, Your Honor. It was composed. Leach and Company were made parties to the suit. The Guardian Savings and Trust Company were made parties and the Struthers Furnace Company. This man prays on his own behalf and on behalf of other stockholders. It is just a matter of the order of proof. Shall I introduce it now?

The Court: There is no importance to be attached to the order of proof. This is one of the lawsuits in which you bring in all of the facts and lay them on the clerk's desk and ask the Court what is the judgment of the law on the facts.

Mr. Wilson: I have agreed with the defendant's attorney instead of bringing the clerk, we will introduce a copy of the petition.

Mr. Day: We don't care anything about proving it that way. We don't see any competency whatever.

The Court: Well, I don't see that it is incompetent. I think that the pleadings in that case and the final disposition of it are proper to be introduced in evidence. It may go in under objection as immaterial and incompetent, and exception if desired.

Mr. Day: We, we do desire an exception.

The Court: I assume there is no objection to using copies.

Mr. Day: No.

Mr. Wilson: I offer in evidence Plaintiff's Exhibit 19, being the petition filed by Frank C. Caine, Court of Common Pleas, Cuyahoga County, Ohio, against the Struthers Furnace Company and A. B. Leach and Company incorporated, and the Guardian Savings and Trust Company, trustee.

The Court: Were answers filed?

Mr. Wilson: As I understand it, there was a demurrer filed which was not passed on when it was settled. I don't find the journal entry here, but I will beg leave to file the journal entry of final disposition of this case, and we may consider it in this case.

Mr. Day: Certainly.

Said Plaintiff's Exhibit 19 is as follows:

PLAINTIFF'S EXHIBIT NO. 19.

Petition in Caine vs. Struthers Furnace Co., et al.

IN THE COURT OF COMMON PLEAS.

No. 205,671.

State of Ohio,
Cuyahoga County, ss.

Frank C. Caine,
1315 Citizens Bldg.,
Cleveland, Ohio,
Plaintiff,

vs.

The Struthers Furnace Co.,
Struthers, Ohio,
A. B. Leach & Co., Inc.,
Guardian Bldg.,
Cleveland, Ohio,
&
The Guardian Savings &
Trust Co., Trustee,
Guardian Bldg.,
Cleveland, Ohio,
Defendants.

ACTION FOR EQUITABLE RELIEF.

The plaintiff says, that The Struthers Furnace Company, is a corporation, organized under the laws of the State of Ohio, with its principal place of business in Struthers, Ohio, where it is engaged in the manufacture and production of pig iron, and that the defendant, A. B. Leach & Company, is a corporation, organized under the laws of the State of New York, with its principal place of business in the City of Cleveland, where it is engaged in buying and selling on its own account and for others stocks and bonds and other securities, and that the defendant, The Guardian Savings & Trust Company, is a corporation, under the laws of the State of Ohio, engaged in the banking business in the City of Cleveland, having under its charter the power to act as a trustee.

FIRST CAUSE OF ACTION.

Plaintiff, for his first cause of action, says, that in the latter part of the year 1919 and the early part of

the year 1920 the defendant, The Struthers Furnace Company, issued and sold a large amount of Cumulative Preferred Stock of that Company and that this plaintiff purchased three hundred (300) shares of said preferred stock, paying therefor the price of Ninety-nine Dollars (99.00) a share and accrued dividends, which was the market price at which The Struthers Furnace Company was then offering its preferred stock for sale, and that it was provided by the Articles of Incorporation of The Struthers Furnace Company and the amendment thereto as follows:

> "No mortgage or other lien other than a purchase money mortgage shall be placed upon the real estate, plant or equipment of the Company, nor shall any bond, debentures, notes or other similar indebtedness having a maturity beyond one year, be issued or created or guaranteed, nor shall any additional preferred stock having priority over or parity with this issue of preferred stock, be issued except in each case with the affirmative vote or consent in writing of the holders of three-fourths in amount of the preferred stock of this issue then outstanding."

Plaintiff says, that said provision limiting the right of said company to place a mortgage or other lien upon the real estate, plant or equipment of the company, or issuing bonds, was written into and made a part of the certificates of preferred stock issued and sold by said defendant at said time, and that said provision was contained in the certificates of the three hundred shares of the preferred stock purchased by this plaintiff, and said provision was relied upon by this plaintiff and constituted a part of the consideration and inducement in causing this plaintiff to purchase the three hundred shares of the preferred stock.

The plaintiff says, that on or about the first of May, 1922, the defendant, The Struthers Furnace Company, issued and sold bonds to the amount of One Million Five Hundred Thousand Dollars ($1,500,000.00), which bonds were in the denominations of One Thousand Dollars, Five Hundred Dollars and One Hundred Dollars and were due and payable on May the first, 1942, said bonds bearing interest at the rate of eight (8) per cent per annum, payable semi-annually on the first day of May and November of each year, and that to secure the payment of

said issue of bonds The Struthers Furnace Company executed and delivered a first mortgage to the defendant, The Guardian Savings & Trust Company, which mortgage conveyed to The Guardian Savings & Trust Company, as trustee, for the benefit and protection of the holders of said bonds the entire fixed property and equipment, including all Railway Rolling Stock of The Struthers Furnace Company then owned by the company or thereafter acquired, and including an undivided one-half interest in certain ore mines, which interest was then owned by the Struthers Company, so that there was then placed upon the real estate, plant and equipment of the company said mortgage for the purpose of protecting and guaranteeing the payment of said bonds, and the plaintiff says, that said action of issuing and selling said bonds and executing said mortgage upon the real estate, plant and equipment of The Struthers Furnace Company was done by The Struthers Furnace Company without first obtaining the affirmative vote or consent in writing of the holders of three-fourths in amount of the preferred stock of the aforesaid issue then outstanding, and that in taking this action The Struthers Furnace Company did so in violation of the rights of this plaintiff and other owners and holders of said preferred stock and in violation of the charter provisions of said company and in violation of the terms and provisions in this respect contained in the certificates of preferred stock issued by the company and purchased by the plaintiff and others, and that the three hundred shares of preferred stock then owned by the plaintiff were thereby diminished in value, and that on account of this unwarranted and unlawful action of The Struthers Furnace Company in violation of the rights of the plaintiff and other owners of preferred stock, the plaintiff has suffered an irreparable injury and that he has no adequate remedy at law, and that he will continue to suffer irreparable injury unless he is granted relief by the equitable action of this court hereinafter prayed for.

Second Cause of Action.

The plaintiff for his second cause of action, adopts all of the allegations in the first cause of action, the same as if they were rewritten herein and says further, that the defendant, The Struthers Furnace Company,

and the defendant, A. B. Leach & Company, entered into an unlawful agreement by which The Struthers Furnace Company agreed to and did purchase from A. B. Leach and Company three thousand (3,000) shares of the said preferred stock of The Struthers Furnace Company and paid A. B. Leach & Company for the same with the bonds or the proceeds from the sale of the bonds of the aforesaid bond issue, and that in doing so The Struthers Furnace Company wrongfully and unlawfully gave preference to A. B. Leach & Company over this plaintiff and other preferred stockholders in the redemption and retirement of its preferred stock, and that The Struthers Furnace Company did not offer to this plaintiff and other preferred stockholders the right and privilege to have his or their stock redeemed in whole or in part or in any ratio or portion whatever, but that contrary to the legal and equitable rights of the plaintiff and other stockholders The Struthers Furnace Company used the bonds or the proceeds of the sale of the bonds of said issue for the purpose of redeeming three hundred thousand dollars of the preferred stock, which had been held by the defendant, A. B. Leach & Company, when the plaintiff and other stockholders were entitled to be given the opportunity by lot or otherwise to participate pro rata in the redemption of any of said preferred stock, and further, that The Struthers Furnace Company was without right and authority to issue and sell said bonds and to use the same or the proceeds thereof for the purpose of redeeming only the preferred stock held by the defendant, A. B. Leach and Company, and that the agreement and contract made between The Struthers Furnace Company in respect thereto was collusive and wrongfully made in violation of the rights of the plaintiff and other preferred stockholders, and that the plaintiff has suffered irreparable injury and damage thereby, and will so continue to suffer unless by an order of this court said transaction is declared null and void and A. B. Leach & Company is ordered to return to The Struthers Furnace Company the bonds or the proceeds thereof taken in exchange and in redemption of said preferred stock, and that the preferred stock thus received by The Struthers Furnace Company be returned to A. B. Leach & Company.

Wherefore, the plaintiff prays that the court may find that the issuance and sale of said bond issue of May the first, 1922, was in violation of the rights of the

plaintiff and other preferred stockholders, and that the execution and delivery of the said mortgage to the defendant, The Guardian Savings and Trust Company, as trustee, was also in violation of the rights of the plaintiff and other preferred stockholders and that the issuance of said bonds and the execution and delivery of said mortgage were null and void, and that the court shall decree that said mortgage is not a lien upon any of the real estate, plant, equipment or property of The Struthers Furnace Company, and that The Guardian Savings & Trust Company, as Trustee, be enjoined and restrained by the order of this court from paying any of said bonds or the interest thereon, and further, that it may be ordered and decreed by this court that the redemption of the preferred stock by delivering to A. B. Leach & Company part of the bonds of said issue or the proceeds thereof, was in violation of the rights of this plaintiff and other preferred stockholders and was unlawful and inequitable and that the same is null and void, and that the Court may further decree that A. B. Leach and Company shall return to The Struthers Furnace Company the bonds so received or the proceeds thereof, and that The Struthers Furnace Company shall deliver to A. B. Leach & Company the three thousand shares of preferred stock so unlawfully transferred and redeemed, and for such other and further relief as is just and equitable.

.....

Attorneys for the Plaintiff.

State of Ohio, ..
Cuyahoga County, ss.

Frank C. Caine, being first duly sworn upon his oath, says, that he is the plaintiff in the foregoing Action for Equitable Relief, and that the statements and allegations contained therein are true, as he verily believes.

.....

Sworn to before me and subscribed in my presence by the said Frank C. Caine this ..... day of November, 1922.

.....

Notary Public.

PRECIPE.

To the Clerk:

Please issue summons for the defendants, A. B. Leach and Company and the Guardian Savings & Trust Company, Trustee, to the Sheriff of Cuyahoga County, and issue summons for the defendant, The Struthers Furnace Company, to the Sheriff of Mahoning County, made returnable according to law.

.....

Attorneys for the Plaintiff.

Mr. Wilson: I want to introduce in evidence here a letter regarding this suit written by Leach and Company to the Struthers Furnace Company, as Plaintiff's Exhibit 20.

Mr. Day: Subject to the same objection as immaterial, incompetent and irrelevant to any issue here.

The Court: It may be received subject to the same objection and exception.

Said Plaintiff's Exhibit 20 is as follows:

PLAINTIFF'S EXHIBIT NO. 20.

Letter, Dated Nov. 22, 1922, Re Caine Suit.

A. B. LEACH & CO. INC.
62 Cedar St.

New York, November 22nd, 1922.

Struthers Furnace Company,
Struthers, Ohio.

Dear Sir:

We have been served in an action by Frank C. Caine which action is based primarily on the theory that the bonds which we bought from you were illegally issued.

We note that you were advised by eminent counsel in this matter, and we do not assume that this cause has any merit.

As it is necessary that an appearance should be made in this case on the 27th inst., we have requested your counsel in Cleveland to appear for us.

In view of the circumstances of this case, we assume that it will be agreeable to you to arrange with your

counsel to relieve us of all responsibility in this matter, and that you will have your counsel represent us along with your own company.

Kindly advise us as to this, and oblige

Very truly yours,

ABL. (Signed) A. B. LEACH & Co. INC.

(Copy sent Mr. Ginn, Nov. 27.)

Mr. Wilson: And the answer to it, Your Honor, dated November 27, as Plaintiff's Exhibit 21.

Mr. Day: Same objection and exception.

The Court: Same ruling. The record will show an objection to it for want of materiality or competency, overruled and exception allowed.

Plaintiff's Exhibit 21 is as follows:

PLAINTIFF'S EXHIBIT NO. 21.

Letter, Dated Nov. 27, 1922, Struthers to Leach, Re Caine Suit.

November 27, 1922.

Messrs. A. B. Leach & Co., Inc.,
62 Cedar St.,
New York City.

Gentlemen:

Your letter of the 22nd inst. has been forwarded to this office from Struthers, Ohio, where it was addressed.

We believe you are correct in assuming that the case of Frank C. Caine has no merit and, furthermore, we believe that Mr. Caine knew it when he brought the suit. As an accommodation we sent the consents received from the Preferred Stockholders to Mr. Ginn at Cleveland who exhibited them to Mr. Caine and his attorney, so the statement made in his application for relief will hardly bear the light.

We note that you have requested our counsel to appear for you. We have always understood that Tolles, Hogsett, Ginn & Morley were your counsel in Cleveland. I see nothing inconsistent in their acting for both parties, but, on the other hand, I see no reason why The Struthers Furnace Company should relieve your Company from any responsibility which it may justly have in the premises.

We have a letter this morning from Mr. Ginn on this subject in which he says it will probably be nine months to a year before the case comes up for trial.

Yours very truly,

THE STRUTHERS FURNACE COMPANY,

By .....

M *President.*

(Copy sent Mr. Frank H. Ginn
Nov. 27)

Mr. Wilson: I have the Journal Entry here, Your Honor, but I want to reserve the right—

The Court: It may be supplied. I think the entire proceedings on the demurrer and answer, if any were filed, as well as the orders as finally made, should go in, in order to complete that item of evidence.

Thereupon, a duly certified copy of the docket and Journal Entries was received in evidence, said documents being as follows:

DOCKET AND JOURNAL ENTRIES.

In Caine Case.

IN THE COURT OF COMMON PLEAS

No. 205671

State of Ohio,
Cuyahoga County, ss.

Frank C. Caine, *Plaintiff,* vs. The Struthers Furnace Co., *et al.,* *Defendants.*	September Term, 1922. EQUITABLE RELIEF.

November 13, 1922. Petition and precipe filed and summons to Sheriff of Mahoning County for the Struthers Furnace Co., and to Sheriff of Cuyahoga County for all other defendants issued.

November 20, 1922. Cuyahoga County Summons returned endorsed: On the 16th day of November, 1922, I served this writ on the within named A. B. Leach & Company, Inc., by delivering a true and certified copy there-

of with all the endorsements thereon to F. M. Lapp, Managing Agent for said Company, the president or other officer of said Company not found in my County. Also on the same date on The Guardian Savings & Trust Company, Trustee, by handing a like copy thereof to I. H. Beers, Managing Agent for said Company, the president or other chief officers not found in my county. Sheriff's fee $1.16.

November 27, 1922. Mahoning County Summons returned endorsed: On the 21st day of November, 1922, I served this writ on the within named Defendant The Struthers Furnace Company by delivering to Louis S. Baldwin, Supt. of said defendant Company at Struthers, Ohio, a true and certified copy thereof with all the endorsements thereon, after making diligent search for and being unable to find the president or other chief officers of said Company within my county. John Maguire, Sheriff. Sheriff's Fees $1.55.

December 16, 1922. Demurrer by The Struthers Furnace Co., A. B. Leach & Co., Inc., and The Guardian Savings & Trust Company, Trustee, filed.

December 30, 1922. To Court: The Petition is dismissed without prejudice, at the cost of the plaintiff for which judgment is rendered against him. Record waived. Journal 229, Page 1984.

January 2, 1923. To Court: By consent of parties the entry in this cause of December 30, 1922, is vacated and said cause is thereupon entered: "This cause settled, petition dismissed at cost of plaintiff." Journal 230, Page 16.

January 5, 1923. To Court: The demurrer by the defendants, The Struthers Furnace Co., A. B. Leach & Co., Inc., and The Guardian Savings & Trust Co., Trustee, to petition is stricken from the docket. Journal 230, Page 73.

$7.11 Received of Plaintiff
Seven and 11/100 Dollars
Costs. January 9, 1923.
George Wallace, Clerk.
7975 By J. C. W., Deputy Clerk.

NOTE:—This Transcript of the docket and Journal Entries in this cause is duly certified to by the Clerk of the Court of Common Pleas of Cuyahoga County, Ohio.

Thereupon, the plaintiff rested.

DEFENDANT'S EVIDENCE.

Then the defendant called as its witness, WILLIAM H. SNYDER, who, being first duly sworn, testified on DIRECT EXAMINATION by Mr. Johnston as follows:

My name is William H. Snyder. I live at 12980 Cedar Road, Cleveland Heights. I am Assistant Manager of Ernst and Ernst, public accountants and auditors. In 1921 and 1922 I was manager of the Reporting Department of Ernst and Ernst, who were then employed as auditors for the Struthers Furnace Company. In connection with the work done by Ernst and Ernst for the Struthers Furnace Company, it was my duty to supervise the work in a general way and particularly the preparation of the reports after the field work had been done. The document you hand me marked Defendant's Exhibit D and which purports to be a statement of earnings from 1911 until and including the year 1921 was prepared by me or under my direction. From the date of the report, I should say that it was prepared during the latter part of April, 1922. The date given on the first page of the report is erroneous and is manifestly due to a typographical error, for the reason that the statement of December 31, 1921, would of necessity come after April 28, 1921. My independent recollection as to the date the report was submitted is that it was submitted during the latter part of April, 1922.

Q. Do you know whether this report, Defendant's Exhibit D, was prepared in connection with the bond issue which was about to be placed by the Struthers Furnace Company, or proposed to be placed by the Struthers Furnace Company upon its fixed assets? A. I would take it that it would be because it is the practice to do those things in connection with bond issues.

Q. To make such statements? A. Yes, sir.

Q. You do not personally know, I take it, whether this report was furnished to A. B. Leach and Company, or a copy of it? A. Our delivery I believe would be made to the Struthers Furnace Company.

Q. And by them to whomever they wanted? A. Yes, sir.

Q. Now, your company, Ernst and Ernst, prepared the audit as of December 31, 1921, for the Struthers Furnace Company, did they not? A. They did.

Q. Defendant's Exhibit C, which I show you, is a copy of that audit, is it not? (Handing to witness) A. I would say that it is.

Q. Did Ernst and Ernst subsequently prepare a balance sheet based upon the balance sheet contained in the audit, Defendant's Exhibit C, but giving effect to the financing resulting from the sale of a $1,500,000.00 of bonds and to the appraisals of the fixed assets made by Brassert and Lyon? A. We prepared such balance sheet based upon the December 31, 1921, balance sheet, but did not attach our signature to it.

Q. In other words, it was the December 31st balance sheet giving effect, however, to these two elements which I have mentioned? A. Yes, sir.

Q. The bond issue sale of a million and a half of bonds and the appraisal figures contained in the appraisals of Freyn-Brassert and Company and Mr. Lyon who appraised the real estate? A. Those items were given effect in that statement.

Q. Will you look at the statement which has been marked Defendant's Exhibit G, and say whether or not that is a copy of such statement as was prepared by Ernst and Ernst in the manner you have described? A. If I may compare this with my copy so I can tell better. (Referring to papers) This is in effect a copy. I have seen some change in wording which is apparently not material, but the amounts—

Q. The figures are correct? A. They are practically the same. I notice one place where there is more detail given than in our balance sheet, but the total figures are the same.

Q. Will you state to the court why this statement which is headed "Consolidated balance sheet" was not signed by Ernst and Ernst? A. Because the firm would then be placed in the position of having certified to facts which had not yet taken place. The financing was simply proposed and had not yet been consummated when this balance sheet had been prepared, and it is our usual practice to simply assist a company or brokers or investment bankers to prepare their figures giving effect to what would be the picture after the financing was accomplished.

Q. In other words, this consolidated balance sheet was prepared before the bonds had been actually sold? A. Yes.

Q. The deal had not been actually consummated? A. That would be probably true.

Q. And it would be for that reason you would not certify to it? A. Yes.

The Court: Do you feel you would assume any responsibility for the values arrived at by the new appraisal?

The Witness: No, we make no effort to pose or take the position of appraisers of permanent assets of any kind.

The Court: You indicate in your statement who is responsible for it?

The Witness: Yes.

The Court: It is what you find on the books or what you find the appraisals to be.

The Witness: Based on appraisals furnished us.

I do not know Mr. Brassert who made the appraisal. I was not acquainted with him and I do not know his reputation in the business.

Thereupon, Defendant's Exhibit G was offered and received in evidence, said exhibit being as follows:

DEFENDANT'S EXHIBIT NO. G.

Balance Sheet as of December 31, 1921.

CONSOLIDATED BALANCE SHEET
THE STRUTHERS FURNACE COMPANY—CLEVELAND AND SUBSIDIARY.

Condensed and adjusted to show effect of new financing based upon certified Balance Sheet prepared by Messrs. Ernst & Ernst as of December 31st, 1921, and the appraisals by Messrs. Freyn, Brassert & Company and Arthur M. Lyon, Esq.

ASSETS

Current		
Cash		$ 66,470.99
U. S. Govt. Securities		55,122.90
Accounts Receivable		41,742.43
Inventories:		
Ore—on basis of 1921 season ore prices	$1,112,196.61	
Pig Iron, other raw materials and supplies at lower of cost or approximate market value	292,365.49	
		1,404,562.10
Life Insurance—Cash Surrender Value		29,350.00
		$1,597,248.42

Other Assets			
Personal and Miscellaneous Accounts, etc....			168,811.70
Undivided One-Half Interest in Ore Mines (Mortgaged under this Bond Issue)			
One-half the independently appraised value of Wade-Helmer Ore Mines.....			710,000.00
Permanent			
The Struthers Furnace Company			
Real Estate as appraised by Arthur M. Lyon	$ 484,590.00		
Plant, Equipment, Rolling Stock, etc., at present day sound values based on appraisal by Freyn, Brassert & Company...	1,852,000.00		
		$2,336,590.00	
Subsidiary Company			
(Property not appraised)			
Surface Lands and depreciated book value of plant, equipment, etc.		21,272.99	
			2,357,862.99
Deferred			
Prepaid Interest, Taxes, Insurance, Discount on Securities, etc.			238,221.40
			$5,072,144.51

LIABILITIES

Current			
Accounts Payable		$ 15,095.66	
Accrued Accounts		39,929.37	
			$ 55,025.03
First Mortgage Sinking Fund 8% Gold Bonds			
(This Issue)			1,500,000.00
Reserves			145,352.36
Nominal			
Capital Stock			
Preferred—7% Cumulative Authorized and Issued	$1,250,000.00		
Less: In Treasury	300,000.00		
	$ 950,000.00		
Common			
Authorized and Issued	1,000,000.00		
		$1,950,000.00	
Surplus			
Including appreciation		1,421,767.12	
			3,371,767.12
			$5,072,144.51

Compiled by Ernst & Ernst.

CROSS-EXAMINATION by Mr. Henderson.

The balance sheet was made up late in April, 1922. I doubt whether there would be any date on Plaintiff's

Exhibit G showing when the balance sheet was made up. My time reports at the office would show that. I haven't anything with me now that would.

Thereupon, the defendant called as its witness C. B. CAMPBELL, who, being first duly sworn, testified on DIRECT EXAMINATION by Mr. Johnston as follows:

My name is C. B. Campbell. I live at South Orange, New Jersey, and am a Vice President of A. B. Leach and Company of 62 Cedar Street, New York City. I have been a Vice-President of A. B. Leach and Company since 1917. I recall several conferences which I had in the office of A. B. Leach and Company with Mr. Runyon, his son and Mr. Zwetsch during the spring of 1922. I heard the testimony of Mr. Runyon this morning with respect to conversations he had in New York with me and others.

Q. Will you state to the Court what if anything was said at any of those conferences in New York between yourself and Mr. Runyon, or Mr. Runyon and his son, if his son accompanied him, concerning the waiver by A. B. Leach and Company with respect to its ownership of preferred stock of the bond issue, that is, the waiver permitting a bond issue to go ahead of the preferred stock? A. We agreed to vote our stock naturally; that is the assumption, that we vote our stock; we held approximately three thousand shares of stock which was about twenty-two per cent of the stock outstanding.

Q. Was there anything said by you or anyone else representing A. B. Leach and Company in those conferences to the effect that you would not consent to a bond issue as a preferred stockholder unless that bond issue was placed through Leach and Company? A. I should think not; I don't remember any such conversation.

Q. In other words, what I am getting at, Mr. Campbell, is did you or anyone representing Leach and Company threaten in any way to withhold consent? A. No.

Q. Or use the fact that you were a preferred stockholder for that purpose? A. Not in my presence.

Q. Did you ever hear of any such thing by Leach and Company? A. No.

Q. Now, do you recall whether Leach and Company, through you or through the other gentlemen who were handling the transaction, requested from the Struthers

Furnace Company a statement by Ernst and Ernst of the earnings of the Struthers Furnace Company from 1911 to 1921? A. I believe we asked them for a ten year statement of earnings.

Q. And did you subsequently receive this statement, Exhibit D? (Handing to witness) A. Yes, we received that statement.

Mr. Johnston: I now offer Exhibit D in evidence.

Thereupon the paper last above referred to, marked Defendant's Exhibit D, was received in evidence, and is as follows:

DEFENDANT'S EXHIBIT NO. D.

EARNINGS, EXPENSES AND SURPLUS ACCOUNT

THE STRUTHERS FURNACE COMPANY CLEVELAND

FOR THE PERIOD FROM MAY 1ST, 1911 TO DECEMBER 31ST, 1921

REPORT FROM

ERNST & ERNST

AUDITS AND SYSTEMS

CABLE ADDRESS "ERNSTAUDIT" NEW YORK

NEW YORK
PHILADELPHIA
BOSTON
PROVIDENCE
WASHINGTON
RICHMOND
BUFFALO
PITTSBURGH
CLEVELAND
CINCINNATI
TOLEDO
DETROIT

ERNST & ERNST

AUDITS AND SYSTEMS

TAX SERVICE

CLEVELAND
HANNA BLDG.

CHICAGO
MINNEAPOLIS
ST. PAUL
INDIANAPOLIS
DENVER
ST. LOUIS
KANSAS CITY
NEW ORLEANS
ATLANTA
DALLAS
FT. WORTH
HOUSTON

April 28th, 1921.

Mr. W. C. Runyon,
President, The Struthers Furnace Company,
Cleveland.

Dear Sir:-

As requested we have compiled from our Audit Reports previously rendered for THE STRUTHERS FURNACE COMPANY - CLEVELAND, covering the period from May 1st, 1911 to December 31st, 1921, inclusive, and submit herewith Summary of Earnings, Expenses and Surplus Account for the period named.

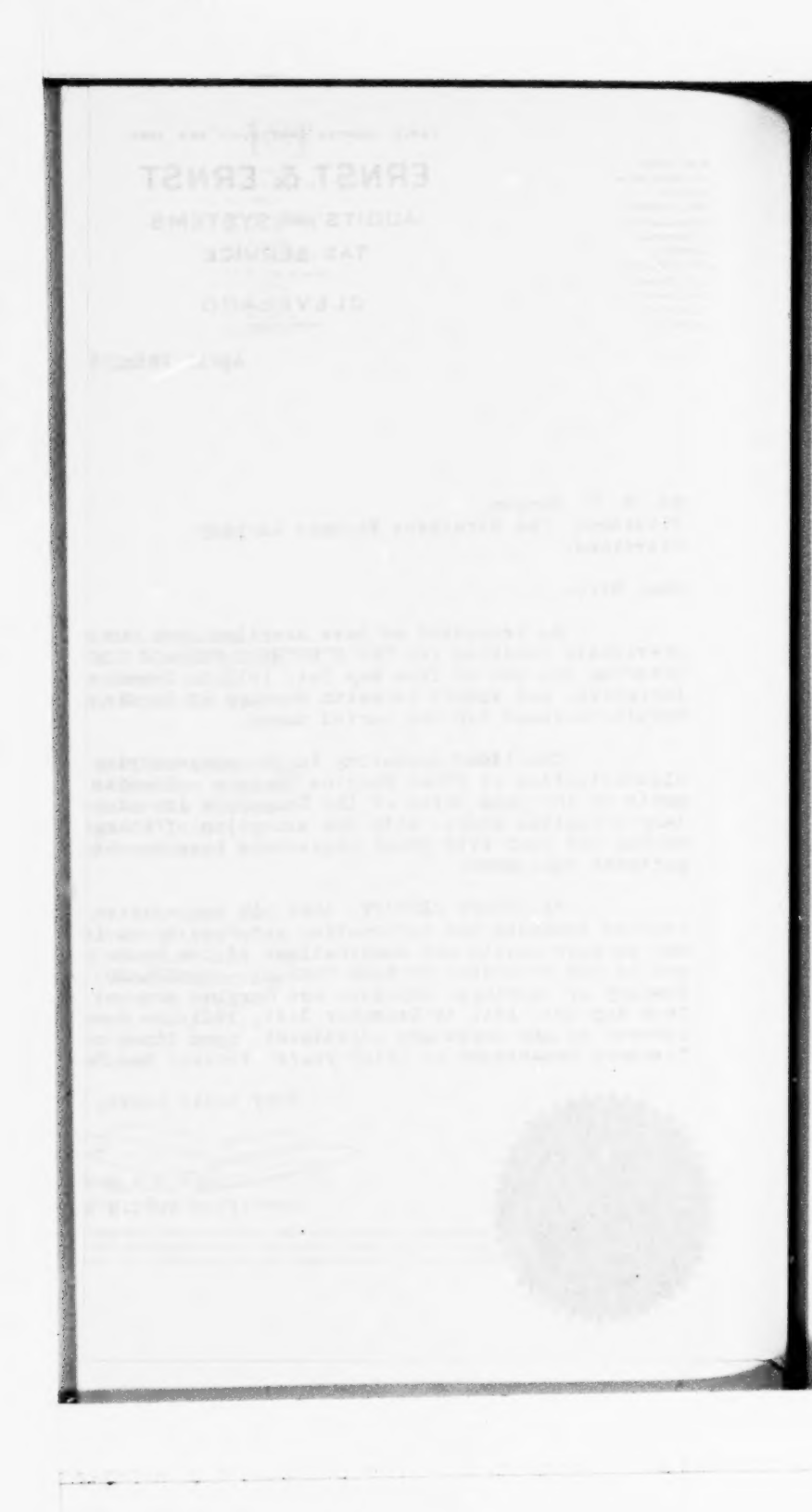
The items appearing in the accompanying exhibit under the classification of Other Surplus Charges - Credits represent adjustments of the book value of the Company's investment in its Subsidiary's Capital Stock, with the exception of charge of $75,000.00 during the year 1918 which represents Loss on obsolete Cement Department Equipment.

WE HEREBY CERTIFY, that, in our opinion, based upon the records examined and information obtained by us in connection with our various audits and examinations of the books of account and record of THE STRUTHERS FURNACE COMPANY - CLEVELAND, the accompanying Summary of Earnings, Expenses and Surplus Account for the period from May 1st, 1911 to December 31st, 1921, is correct, subject, however to any necessary adjustment, upon final review by the Treasury Department of prior years' Federal Tax Returns.

Very truly yours,

Ernst & Ernst

Certified Public Accountants



EARNINGS, EXPENSES AND SURPLUS ACCOUNT

THE STRUTHERS FURNACE COMPANY
CLEVELAND

For the Period from May 1st, 1911 to
December 31st, 1921

Printer's Note:

The figures on this Exhibit tabulation which are underscored with a rough pen line were typed in red on the Original Report.

EARNINGS, EXPENSES AND SURPLUS ACCOUNT

THE STRUTHERS FURNACE COMPANY - CLEVELAND

For the period from May 1st, 1911 to December 31st, 1921.

FOR PERIOD ENDED	SALES NET	COST OF SALES	GROSS PROFIT	SELLING, GENERAL AND ADMINISTRATIVE EXPENSE	OPERATING PROFIT-LOSS	OTHER A D DEPRECIATION	OTHER A D AP INTEREST NET	
Apr. 30-1911					14,082.92	$ -o-	$ 36,569.34	$
Apr. 30-1912 (year)	$ 1,788,193.27	$ 1,722,720.90	$ 65,472.37	$ 51,389.45	15,924.27	-o-	34,907.78	
Apr. 30-1913 (year)	1,393,873.59	1,359,406.71	34,466.88	50,391.15	41,015.68	-o-	39,294.29	
Apr. 30-1914 (year)	2,004,033.58	1,911,260.62	92,772.96	51,757.28	32,709.20	-o-	29,436.27	
Apr. 30-1915 (year)	1,523,257.86	1,500,094.70	23,163.16	55,872.36	119,973.15	-o-	27,263.46	
Apr. 30-1916 (year)	1,975,441.22	1,796,944.63	178,496.59	58,523.44	373,116.06	-o-	43,718.27	
Apr. 30-1917 (year)	2,905,893.22	2,502,778.65	403,114.57	69,998.51	519,219.32	47,262.39	18,460.76	
Dec. 31-1917 (8 mos.)	3,593,410.65	2,984,326.31	609,084.34	89,865.02	1,371,263.30	80,701.10	9,499.46	
Dec. 31-1918 (year)	5,922,966.07	4,428,722.82	1,494,243.25	122,979.95	285,486.06	100,634.00	29,730.45	
Dec. 31-1919 (year)	3,011,933.93	2,551,638.65	460,295.28	174,809.22	392,457.83	124,875.89	34,356.64	
Dec. 31-1920 (year)	4,221,750.81	3,564,919.31	656,831.50	264,373.67	136,267.03	30,359.89	87,412.17	
Dec. 31-1921 (year)	804,071.41	755,388.57	48,682.84	184,949.87				
	$29,144,825.61	$25,078,201.87	$4,066,623.74	$1,174,909.92	$2,891,713.82	$ 383,833.27	$ 390,550.89	$

OTHER ADDITIONS & DEDUCTIONS								SURPLUS	
INTEREST NET	DEPRECIATION APPRECIATION OF INVENTORY	OTHER ADDITIONS DEDUCTIONS NET	SPECIAL ADDITIONS DEDUCTIONS	PROVISION FOR FEDERAL TAXES AND CONTINGENCIES	NET PROFIT-LOSS	OTHER SURPLUS CHARGES CREDITS	DIVIDENDS PAID	INCREASE DECREASE FOR PERIOD	BALANCE END OF PERIOD
									$ 577,344.82
$ 36,569.34	-o-	$ 32,704.95	$ 117,127.45		$ 61,936.08	$ 74,305.11	$ 368,200.00	$ 231,858.81	345,365.78
34,907.78	37,084.80	6,664.88	75,550.90		5,237.87	30,878.02	-o-	25,640.15	319,745.60
39,294.29	19,910.54	8,105.77	-o-		26,294.92	13,302.99	-o-	39,597.91	280,147.69
29,436.27	-o-	11,279.01	16,442.00		56,984.48	57,818.51	-o-	114,802.99	165,644.70
27,263.46	42,153.78	40,959.40	-o-		93,904.07	20,263.88	-o-	73,640.49	239,285.19
43,718.27	-o-	4,658.98	42,859.49	$ 34,559.55	207,319.77	-o-	37,500.00	169,819.77	409,104.96
18,460.76	87,587.28	11,338.95	-o-	212,313.00	317,431.50	-o-	330,000.00	12,568.50	396,536.46
9,499.46	-o-	46,493.79	138,522.72	800,000.00	296,046.23	75,000.00	255,000.00	33,953.77	362,582.69
29,730.45	-o-	43,723.99	-o-	15,000.00	96,397.62	287,953.33	140,233.33	214,117.62	576,700.31
34,356.64	-o-	4,422.46	-o-	30,000.00	207,647.76	19,779.06	209,051.36	19,182.86	557,517.65
87,412.17	82,265.85	19,697.07	-o-	-o-	356,002.01	31,765.11	87,500.00	475,267.12	82,250.53
$ 390,550.89	$ 64,649.47	$ 221,204.33	$ 22,262.76	$1,091,872.55	$ 846,639.49	$ 53,751.17	$1,425,484.69	$ 495,094.03	$ 82,250.53

Q. Mr. Campbell, did you also receive from the Struthers Furnace Company the documents which I now show you, or the originals thereof, namely, an audit prepared by Ernst and Ernst of the affairs of the Struthers Furnace Company, as of December 31, 1921, Defendant's Exhibit C; appraisal of Arthur M. Lyon and Company, Defendant's Exhibit A; appraisal by Brassert, Defendant's Exhibit B, 1 to 5, inclusive, and appraisal of H. A. Brassert contained in the letter under date of March 30, 1922, Defendant's Exhibit F? A. We received Exhibit C. As to these other Exhibits, I can only say that I presume we received them; they would not necessarily come under my jurisdiction. That would be handled by the man who had in charge the collecting of the information and the putting it together in the proper form. It necessarily would not come across my desk.

Q. I will say, Mr. Campbell, that these original appraisals were received from the New York office of A. B. Leach and Company. A. That might be, but it would not necessarily go across my desk.

Q. Did you pass upon the question before A. B. Leach and Company exercised its option to purchase this $1,500,000.00 of bonds, as to whether or not the requirements of the contract with respect to appraisals and audits, and so forth, had been furnished to Leach? A. I did.

Q. And what did you find? A. I found that the necessary papers substantiating figures given in our circular, and so forth, as terms of the contract were complied with.

Q. Now, I will ask you whether or not, as vice-president of Leach & Company, in accepting this option, electing to exercise this option and in making the contracts of purchase, A. B. Leach and Company relied upon the appraisals and audits furnished by the Struthers Furnace Company in accordance with the contract? A. Absolutely.

Q. Did A. B. Leach and Company, outside of the figures furnished by the Struthers Furnace Company through these expert accountants and expert appraisers, have any independent knowledge of the financial affairs of the company or of the value of its assets? A. Well, we had financed the company before on an issue of the preferred stock, and naturally we were familiar with the company's affairs to some extent, how closely it is hard

for me to say, because that is a department by itself which keeps track of those matters.

The Court: That financing of the preferred stock had taken place, I believe, in 1919?

The Witness: I don't remember the date, Your Honor, but it was some years prior.

The Court: It was several years prior to this?

The Witness: Yes.

Q. But in any event, in 1922 when you entered into the contract to purchase, I take it you relied upon the statements that were furnished you by the Struthers Furnace Company as the basis for the contract? A. We made an entirely new examination and relied upon the information that we got in the examination as to whether or not we would go ahead with the bond issue.

Q. And by examination you mean examination of the audits and appraisals? A. Through independent appraisals and through independent audits.

Q. Now, do you know, Mr. Campbell, whether in purchasing these bonds A. B. Leach and Company paid accrued interest on the bonds at the bond rate of eight per cent from May 1, 1922, to the date of delivery of the bonds? A. Yes, sir, that was the usual form of buying bonds, the interest up to the date of delivery.

Q. How many years have you been in the business of selling securities? A. Nineteen years.

Q. And are you familiar with the general uses, practices and customs in the security business, the selling of securities? A. I think so.

Q. I will ask you whether or not there is any general practice in the selling of preferred stocks as to whether they are sold with accrued dividends, using that as a technical term? A. I would say that it might be a little bit in favor of selling stocks and accrued dividends. I mean by that that more often stocks are sold, preferred stocks are sold and accrued dividends than are sold flat.

Q. Just what is meant by the term, technical term so much and accrued dividends? A. It means the accrual of dividend from the last dividend period payment up to the date that it is purchased.

Q. Was the preferred stock of the Struthers Furnace Company which was sold through your firm in 1919 accumulative preferred? A. Accumulative preferred stock.

Mr. Johnston: Gentlemen, is there any question about the fact that Leach and Company at the time of these transactions owned the three thousand shares and that they stood in their name?

The Court: No, I don't understand that there is.

Mr. Henderson: It is admitted in the pleading.

Mr. Johnston: Let the record show that at the time of these transactions and at the time the stock was turned in for transfer in accordance with this contract of April 19, 1922, three thousand shares of the preferred stock of the Struthers Furnace Company was owned by A. B. Leach and Company and stood upon the transfer books in the name of A. B. Leach and Company.

Cross-Examination by Mr. Henderson.

I was with the defendant, A. B. Leach and Company, in 1919 when the company underwrote the preferred stock issue. I am not familiar with the various provisions of the Articles of Incorporation with reference to the issue of that preferred stock. I personally did not handle that issue. I was not familiar with the provisions appearing on the face of the preferred stock certificate itself. I did not have possession of that stock certificate. I think those stock certificates evidencing these 3000 shares of preferred stock were in Cleveland office of the company. I had nothing to do with the making of the application to the Department of Commerce in the Division of Securities for the exemption of these bonds in the State of Ohio. That was handled by another department, possibly through the Cleveland office. Possibly the information was taken from our records in New York or from the information we had in the New York office, but not through me. That would be done by a clerk in our office. I might sign the application, but I might not necessarily know what was in it. That would be handled by someone else.

Q. You knew in May of 1922, didn't you, when these bonds were purchased or agreed to be purchased from the Struthers Furnace Company, that they in February of that same year had been obliged to borrow money from A. B. Leach and Company to pay the dividends that had accrued in February, February 1st of that year? A. I presume that is so, but that is the usual occurrence.

Q. I am asking you if you knew of that fact? A. I can't say that I remember it, no. That might be.

Q. Do you remember as to whether or not you knew the fact that they were obliged to borrow money in order to pay the dividend which accrued in May of 1922? A. Well, if I did know it it didn't mean anything because that is quite a common occurrence.

Q. Well, do you recall it? A. No, I don't recall it. I didn't recall it until I heard it come out in the testimony this morning.

Q. At any rate, you did talk with Mr. Runyon in New York concerning the fact that if you were given the option to purchase these bonds on the terms and provisions that the option specified, that you would give them your consent to authorize the issuance of these bonds to the extent of your three thousand shares? A. Well, waiver, whatever it was that was necessary.

Q. And that was done, as a matter of fact, wasn't it, your agreeing to give your consent to the bond issue was done in consideration of their giving you their option to purchase these bonds, wasn't it? A. No.

Q. Do you remember having received the original of a letter marked Plaintiff's Exhibit 9 from the vice-president of the Struthers Furnace Company to A. B. Leach and Company, or did that come to your attention in your New York office? I see it is addressed to Guardian Building in Cleveland. Do you know if the original of that letter came to your office? A. No, I haven't any idea. I don't remember the letter.

Q. Did these papers come to the New York office at all, that is, the option, the granting to A. B. Leach and Company of the right to purchase these bonds, did that come to your office in New York at all? A. I don't know whether that contract was signed in New York or whether it was signed by Mr. Zwetsch in Cleveland.

Q. Do you remember anything about having seen it? A. Well, I have seen copies of it. Whether I saw the original or not, I don't remember.

Q. As a matter of fact, Mr. Campbell, would you have consented to the issuance of these bonds at all if it had not been for the fact that you were to be given in that option the right to exchange the preferred stock that you owned as part payment for the bonds? A. I don't see why we shouldn't.

Q. Would you? Is it your idea now you would have, that is, you would have consented to a bond issue to be secured by mortgage on the property and therefore to be ahead of the preferred stock that you then owned? A. I think we felt very strongly it was the proper thing for the company to do to raise this money on a long term bond issue rather than to leave the company in debt to banks that might be called at any time; with money conditions as they were at the time. The decision was to clean up the situation, take the loans away from the banks and give the company working capital, which in many instances is the proper thing for a company to do.

Q. And you say then you would have done it if, however, you had not been given the opportunity to trade in your preferred stock as part payment on these bonds? A. I can best answer that by saying we have done it in the past.

Q. I say, is it your idea now you would have done it in this instance? A. That is rather a hard question to answer. You are asking me to go back four years. It is quite a long time.

Thereupon the defendant called as its witness HORACE C. ZWETSCH, who being duly sworn testified on DIRECT EXAMINATION by Mr. Johnston as follows:

I have heretofore testified in this case in behalf of the complainant. In 1921 and 1922 I was Vice-President in charge of the office of A. B. Leach and Company, Cleveland. During the years 1921 and 1922 the preferred stock of the Struthers Furnace Company was being sold through the Cleveland office of A. B. Leach and Company. I knew of those sales because they came under my direction and charge. I was familiar with the prevailing market price or value of the preferred stock of the Struthers Furnace Company during the period from January 1, 1922, up to and including the month of May, 1922. I was familiar with the market value of that preferred stock because every day I was trading in stocks and bonds in the Ohio market.

Q. What was the market value of the Struthers Furnace Company preferred during the month of May, 1922? A. Eighty-seven and a half.

Q. Eighty-seven and a half? A. Yes, sir.

Q. And how is that value arrived at, from what source? A. By sales confirmed and paid for.

Q. Through the office of A. B. Leach and Company? A. Yes, sir.

Q. To customers of that company? A. Yes, sir.

The Court: Was it a listed stock?

The Witness: No, sir.

The Court: Not listed on the Cleveland Stock Exchange?

The Witness: No, sir.

The Court: There was no activity in the stock during that period?

The Witness: Not outside of the activities in unlisted stocks.

The Court: Not outside of the applications to and sales made by A. B. Leach and Company on unlisted stock?

The Witness: Yes, sir.

Q. Were other brokerage houses selling the stock? A. There had been, there were something like sixteen or eighteen brokers in the original account. Of course, I had no means of keeping track of their trade.

The Court: Whether they were still trading or not, you don't know?

The Witness: I don't know.

Q. Now Mr. Zwetsch, there has been introduced in evidence here a letter written by the Chicago office of A. B. Leach and Company, May 2, 1922, by Mr. Hanford, marked Plaintiff's Exhibit 10. Will you look at that letter? (Handing to witness) A. Yes, sir.

Q. Are you familiar with the circumstances which prompted the writing of that letter? A. I am.

Q. Is Mr. Hanford now alive? A. No, I understand he is dead.

Q. Will you state what the circumstances are in connection with the writing of that letter, to your knowledge? A. I was in Chicago for the purpose of getting the consent of the "blue sky" commission to sell Struthers bonds in Illinois, and Mr. Hanford had charge of it. Consulting his attorneys, whom I think were Chapman and Parker, we found it was necessary to get an engineer's report. I called up Mr. Brassert and stated the circumstances, and he said if Mr. Hanford would come

up he would give him such a report. I assume that he did, although I left Chicago that night.

Q. Was anything said as to whether that would be a copy of the appraisal or report that he had heretofore discussed? A. I assume from my conversation it would be in keeping with it.

Q. That was all there was to that transaction? A. Yes, sir.

Q. Were you present in the New York office of A. B. Leach and Company on the occasion which Mr. Runyon testified to, or at least one of the occasions when he testified to having a conference with Mr. Campbell and others regarding this proposed bond issue? A. Yes, I have been there several times.

Q. Will you state what if anything was said at any of those conferences regarding the waiver by Leach and Company as to the three thousand shares of preferred stock which they held in the event that a bond issue was to be placed on the property? A. I don't remember that subject was ever mentioned. The primary question there was whether we would get a bond issue at all or not.

Q. You had numerous negotiations in Cleveland with Mr. Runyon, did you not? A. Yes.

Q. At any time was it ever stated by anyone in your presence representing Leach and Company to Mr. Runyon or any other representative of the Struthers Furnace Company, that Leach and Company would not sign such a waiver unless a contract was made for the sale of bonds to them and the exchange of their preferred stock? A. Never, in my presence, or any suggestion of it.

Q. Never was made? A. Never.

Q. How long had you been engaged in the sale of securities in 1922? A. About eighteen or twenty years.

Q. And were you familiar with the customs and practices relating to the sale of securities, the common terms used? A. I think I am.

Q. And what is meant by the sale of preferred stock so much with accrued dividends? A. It means the dividends from the last paid dividend.

Q. What can you say as to the general custom and practice in the investment and stock and bond business

with respect to the sale of preferred stocks on those terms, namely, at a given price with accrued dividends? A. Why, I think it is safe to say seventy-five per cent are always sold with accrued dividend. Once in a while of course, a few days after the dividends are due, in order to put a sale through, the salesman can allow that dividend, but almost universally, since the stock exchange changed its rule about five or six years ago, or ten years ago, perhaps, making all transactions in bonds payable with interest, the tendency has been to charge interest on both stocks and bonds where there was an interest rate.

Q. You were the representative of Leach and Company on the ground here at Cleveland? A. Yes, sir.

Q. Did you know in May, the month of May, 1922, or have any information that the Struthers Furnace Company would not pay dividends upon the next dividend day? A. No, sir.

Cross-Examination by Mr. Wilson.

Q. After the contract had been entered into between Leach and Company and the Struthers Furnace Company, giving Leach and Company the right to exchange its preferred stock for bonds which were to be issued, Leach and Company became quite active in endeavoring to obtain an appraisement upon which to base a bond issue, did it not? A. I wouldn't say so, no, sir.

Q. So that on May 1st, you received a copy of the appraisal of the company's real estate at Struthers, and you replied on May 2nd, that you had also—"pleased to advise you that Brassert has agreed to furnish us with an appraisal of $1,856,170.00 covering lands, buildings and permanent improvements"? A. Yes, sir.

Q. You had already, before the bonds had been issued at all, succeeded in getting from Brassert a statement to Leach and Company that he would put for you an appraisement of $1,856,000.00 on that land, didn't you? A. That was not for the purpose of a bond issue at all, as I told you.

Q. To enable you to sell bonds that had not yet been authorized, was it not? A. We had to authorize them before we sold them, didn't we?

Q. Yes, sir, but you had taken time by the forelock and were getting ready to sell the bonds that had not

yet been issued and could not be issued without your vote, had you not? A. I don't know about that, sir.

Q. You knew it couldn't have been issued without your three thousand shares? A. I don't know when we turned the stock over.

Q. You didn't turn the stock over until you got the bonds, certainly, did you? A. The whole thing was in the hands of our attorney.

Q. Well, you didn't turn your stock over for bonds until you got your bonds? A. Oh, no.

Q. And you didn't get your bonds until they had been authorized? A. Probably not.

The Court: As I understood Mr. Zwetsch's reference to that Brassert valuation of a million eight hundred thousand, that was given to you in connection with the permission in Illinois to sell Struthers bonds in that market?

The Witness: Yes.

Q. That was to enable you to comply with the law of Illinois to sell the bonds in Illinois after they were issued and after you got them? A. That is as I understood it, yes, sir.

The Court: Who is Brassert?

The Witness: Brassert is one of the outstanding appraisal engineers in the United States in this class of work and has been for two generations.

The Court: Where is his office?

The Witness: In Chicago. I think he is in the Peoples Gas Building at the present time. He used to be. He is the man who recently made this report on the Rhine-Elbe, Germany, for this large federation loan.

The Court: Had he been making appraisals for A. B. Leach and Company in connection with bond issues, and stock issues at that time or prior thereto?

The Witness: I don't recall that he ever did.

Mr. Johnston: Has he specialized in this field, in the field of furnaces?

The Witness: Yes.

Q. It has been shown in evidence here that Leach and Company elected to exercise its option to turn in its preferred stock for bonds. A. Yes, sir.

Q. On May 23, 1922. Two weeks before that time Leach and Company were advertising these bonds for

sale, were they not, in the Cleveland Plain Dealer? A. I couldn't tell you, sir.

Q. Weren't you the vice-president of the company? A. Yes, sir.

Q. Weren't you located in Cleveland? A. Yes, sir.

Q. Didn't you get out that advertisement published May 9th, in the Plain Dealer in Cleveland? A. I never got out an advertisement from this office.

Q. Where was it gotten out? A. By our advertising agents in New York.

Q. You will not deny this ad was inserted then by your advertising agents in the Cleveland Plain Dealer, May 9th, about nearly two weeks before you had elected to take the bonds at all? A. I don't know, sir; I haven't the least idea.

Q. Well, that is your advertisement, isn't it? (Handing to witness) A. It purports to be, yes.

Q. Would you think there is any doubt about it?

The Court: Well, he hasn't any more information about it from his testimony than you have, Mr. Wilson, or the Court has.

Q. You had some conversation with Mr. Runyon with reference to this bond issue? A. I had several.

Q. There were two things which you and Runyon were talking about, you representing Leach and Company and Runyon representing the Struthers Furnace Company, as I take it. The one is the contemplated bond issue and the terms of it; the other the contract with Leach and Company to purchase the bonds. Those two things, were they not? A. Well, that wasn't all, certainly.

Q. Well, those two matters were taken up? A. Yes.

Q. And they were taken up together, were they not? A. What do you mean by taken up together?

Q. I mean the two subjects were talked over between you and Runyon at the same time? A. The subject of buying bonds and what?

Q. And the subject of whether they would have any bonds? A. Yes, I guess so.

Q. Leach and Company and the Struthers Furnace Company were endeavoring to get together upon a bond purchasing contract with Leach and Company? A.

Well, we discussed it several times, if that is what you mean.

Q. You discussed the desirability of a bond issue and also the question of your becoming interested as purchasers of the bonds if they were issued? A. Yes, sir.

Q. You were stockholders to the extent of 3014 shares? A. Yes, sir.

Q. You were willing to purchase these bonds—when I say you I mean Leach and Company—you were willing to purchase these bonds if you were given the option to pay for part of the bonds in your preferred stock? A. Well, that is a contract we made, it seems.

Q. Well, you were not willing to purchase the bonds unless you could purchase them with preferred stock and cash? A. That is not so, sir.

Q. Well, that was the contract you made? A. That is the contract we made, sir.

Q. And that was the contract you insisted on,—Leach and Company? A. It was not.

Q. That was the contract you proposed? A. It doesn't make any difference; we didn't insist on it, sir. It is the contract we finally made.

Q. You mean you would have agreed on better terms? A. I don't know, sir, anything about that, what we would or would not have agreed upon.

Q. Well, the terms you agreed upon— A. Were those embodied in the contract.

Q. In other words, that you should have the privilege, if you bought the bond issue, of exchanging part of it for preferred stock? A. Yes.

Q. You had your 3014 shares which, in order to effect the bond issue, you would have to vote in the affirmative? A. Two thirds of the preferred stock would have to vote for it.

Q. Three-fourths, sir. A. Three-fourths.

Q. And that three-fourths would have to include your three thousand shares? A. I think we held something like twenty-two per cent.

Q. So that when your company received the letter enclosing the duplicate option signed by the Struthers Furnace Company returning them to you for your sig-

nature, you knew what they meant by saying "This is sent to you with the understanding that we receive from you the three thousand shares"? Your consent, I mean, to vote these three thousand shares? A. I just told the Court just what this situation was.

Q. I would like to have an answer to that in your own way.

The Court: I don't believe in argumentative, hair splitting questions. Tell me what you want to say.

The Witness: Mr. George Coulton, of the Union Trust Company, was a director of the Struthers Furnace Company, and he called me over one day and he said, "We better get this thing through. The Struthers Furnace Company owes the bank a lot of money here, and we have got to have it to put a bond issue out—

The Court: How was he interested in it?

The Witness: He was interested in the Struthers Furnace Company.

The Court: But he was also at the bank?

The Witness: Yes. And I went to Mr. Ginn, of Tolles, Hogsett, Ginn and Morley, our attorneys, and I said, "Before the deal is worked out I want you to take it and work it out." So when this contract was made we turned it over to him to prepare every paper. An arrangement was made with the Guardian for carrying the bonds. That was all there was to the transaction.

Q. So I say, when you received this letter of April 15, enclosing the duplicate of the contract, option contract, requesting your signature, you knew what they meant by saying—"The aforesaid mentioned papers are handed to you with the understanding that we shall receive from you the consent and proxy covering the preferred stock"? A. I don't know whether I did or not. We had a contract, as I understood it, and was following that.

Q. Well, pursuant to this letter you did sign the option and you did return them the stock? A. I turned it over to Mr. Ginn.

Q. Well, their attorney? A. Yes, sir, our attorney also.

Q. You were familiar, were you, with the resolutions—I don't know whether you were individually familiar—the resolutions by which this preferred stock was originally issued? A. I don't think so, Mr. Wilson.

Q. You were familiar with the conditions written on the face of the preferred stock, weren't you? A. I may have read it; I don't know whether I had or not.

Q. You don't know under what conditions the company was authorized— A. I couldn't tell you now; there are so many of those transactions.

Mr. Wilson: That's all.

Mr. Johnston: At what price did Leach and Company buy this preferred stock originally from the Struthers Furnace Company?

The Witness: Ninety-two or ninety-two and a half. I can't tell you which one.

Whereupon, both the plaintiff and the defendant rested. The evidence was closed and the cause was submitted to and taken under advisement by the Court.

PLAINTIFF'S EXHIBIT NO. 17.

Letter, dated Dec. 5, 1921, Zintsch to Runyon.

A. B. Leach & Co., Inc.

Guardian Trust Bldg.,
Cleveland, Ohio,
December 5, 1921.

Mr. Walter C. Runyon, Jr., Vice-President,
The Struthers Furnace Company,
Citizens Bldg.,
Cleveland, Ohio.

My dear Mr. Runyon:

I understand that you now have Ernst & Ernst, Auditors, at work on your books. I think it is imperative in view of the general situation, that you get a preliminary report from them by the 15th of this month if you possibly can. After the first of the year, they could bring the report down to and including the 31st of December, 1921. These are times when people are not astounded by losses and unfavorable statements, but they do insist on knowing just how things stand.

Such a report would be of great assistance to us in answering questions from the holders of your stock, as well as those from prospective investors. I believe this

would have a very strong supporting influence on this market.

Trusting you can furnish us with such a report, I am, with best respects,

Yours very truly,

(Signed) H. C. ZINTSCH,
Vice President.

HCZ:*

STIPULATION.

It is HEREBY STIPULATED, by and between the parties to the above entitled cause, by their respective Solicitors of record, as follows:

1. That the foregoing statement of the evidence and the attached form of certificate to be signed by the Judge of the above entitled Court prepared by the above named Defendant, pursuant to Equity Rule No. 75, have been submitted to and examined by the above named Plaintiff, and his Solicitors.

2. That said statement is true, complete and properly prepared and that the Judge of said Court may approve the same and sign the attached certificate upon presentation of said statement and certificate to said Judge, the said Plaintiff waiving lodgment of the same in the Clerk's Office for examination by said Plaintiff, notice of the lodgment thereof, as well as notice of the time and place when the said defendant will ask the Court or Judge to approve the said statement.

3. That the Court may, without further notice, enter an Order directing that so much of the testimony as has been reproduced in the exact words of the witnesses in the foregoing statement prepared by the defendant, with the consent of the Plaintiff, be reproduced in the exact words of the witnesses.

4. That the foregoing matters and things have been agreed to in order to expedite the Appeal of the above named Defendant from the final Decree entered in the above entitled cause on March 18, 1926, and it is further agreed that the statement, when certified by the Court, shall be filed in the Clerk's Office and become a part of the record in said cause for the purposes of the Defendant's said Appeal, to the same extent as it would have become a part of the record if all the provisions of

Equity Rules No. 75 and No. 76 had been literally complied with.

Dated this 19th day of April, A. D. 1926.

J. P. WILSON and
A. M. HENDERSON,
of WILSON, HAHN, HENDERSON & WILSON,
Solicitors for Plaintiff.

DAY & DAY,
NEWMAN, POPPENHUSEN, STERN & JOHNSTON,
Solicitors for Defendant.

Be it further remembered that the foregoing was all the evidence and testimony offered, admitted or excluded and all the proceedings had on the hearing of said cause which do not already appear of record, herein.

Be it further remembered and certified that the foregoing stipulation was signed by the respective Solicitors for Plaintiff and the Defendant, for the purposes therein expressed; and it appearing that the said statement is true, complete and properly prepared, it is hereby approved, settled and allowed as a true, complete and correct statement in narrative form of the evidence introduced in said cause, with the exception of parts of the testimony of certain witnesses which, by agreement of the parties and the direction of this Court, were reproduced in the exact words of said witnesses.

Inasmuch as the matters above set forth do not fully appear of record in this suit and the defendant prays that the same may be certified under the hand of the Judge of this Court and thereby made a part of the record in said cause, it is accordingly certified this 21st day of April, A. D. 1926.

D. C. WESTENHAVER,
Judge of the District Court of the United States, Northern District of Ohio, Eastern Division.

OPINION

(Filed Mar. 3, 1926.)

WESTENHAVER, *District Judge.*

Plaintiff is the Receiver of the Struthers Furnace Company, an Ohio corporation, duly appointed by the Common Pleas Court of Mahoning County. As such, he possesses all the powers conferred by statute and general principles of equity on a Receiver. On April 15, 1922, this corporation had outstanding $1,000,000 par value common stock, and $1,250,000 par value seven per cent. cumulative preferred stock. This preferred stock had been issued in December, 1919. It had been bought by the defendant, A. B. Leach & Company, and resold and distributed to a large number of persons. A. B. Leach & Company, on April 15, 1922, was the owner of 3014 shares of the par value of $301,400. This preferred stock had no voting power except under certain conditions of default not material to be stated. It was entitled to priority over all common stockholders, both as to dividends and principal. It was provided in the company's charter and in the certificates that the same could be redeemed only from the net surplus profits left at the end of each year after payment of the agreed preferred dividend and all taxes. It was also provided that no mortgage should be placed on the corporation's assets prior to said preferred stock, without the written consent and waiver of the holders of three-fourths thereof.

On May 5, 1922, the corporation executed a mortgage on its fixed assets, securing an issue of negotiable mortgage bonds of the face amount of $1,500,000. The fixed capital was then impaired. Its book surplus at the end of the year 1921 was eighty-two thousand some hundred dollars. Prior to May 1, 1922, its book surplus had been wiped out and a deficit created. The preferred stock dividends due February 1, 1922, were paid by money advanced for that express purpose by defendant. The dividends due May 1 were paid with money borrowed from a bank. This financial condition was at all times well known to defendant. The corporation on and prior to May 1 had become largely indebted to various banks. In March or April, 1922, an officer of one of these creditor banks, who was also a common stockholder and a director of said corporation, urged payment of these bank loans and suggested a bond issue as a means to that end. All steps leading up to the making of this

mortgage and the issue and sale of these bonds, were conducted by the corporation's President and Vice President, with the knowledge and co-operation of defendant's duly authorized representatives. The latter took part in settling the terms and conditions of such issue, in procuring new appraisals of fixed assets, such as would make a favorable basis on which to offer the bonds for sale, and also in procuring waivers or consents of preferred stockholders to the giving of the mortgage. An optional agreement was made between defendant and the corporation for the purchase by the former of these bonds when issued. This agreement, duly reduced to writing, is dated April 5, 1922. It fixes the price at which these bonds were to be sold to defendant as 90 and accrued interest (later modified to 90-1/2) and also permits the defendant to pay for a part thereof by turning in its preferred stock at $85 a share and accrued dividend. This agreement and its terms were made before any action was taken to secure waivers from preferred stockholders, approval of common stockholders, or of the corporation's Board of Directors, or re-appraisal of the corporation's fixed assets.

Preferred stockholders, other than defendant, when giving written waivers, did not know and were not advised of this term of the agreement permitting defendant to take bonds in exchange for its preferred stock. The creditors were likewise ignorant, except as notice may be imputed through membership on the Board of Directors of an officer of one of the bank creditors. No meeting was called or held, of preferred stockholders. Their waivers were solicited through the mail and in writing on written representations that these bonds were to be issued to refund floating debts, add working capital, and for other corporate purposes. Plausible statements were made to justify the transaction and induce the belief that the condition of the company was good and its future prospects were bright. In the written request it is said : "We have discussed the matter with A. B. Leach & Company, Inc. of New York, who sold our preferred stock, and the proposed financing carries with it their unqualified approval." A. B. Leach & Co. participated in circularizing the preferred stockholders and in recommending that the waivers be given. Under date of April 3, it circularized the preferred stockholders under its own name, representing that it had made an exhaustive examination and expressing the opinion that

the best interests of the preferred stockholders would be preserved if the proposed waivers were given and the bonds issued. The positive belief is also expressed that the proposed financing would place the company in a stronger financial position than ever. Defendant's letter ends with these words: "We unhesitatingly recommend that you give your consent." Defendant did not then or at any other time advise stockholders or creditors that in giving its own consent, its seven per cent. preferred stock was, as a result, to be converted into an eight per cent. mortgage bond at 90 or 90-1/2. Defendant gave its written consent for 3014 shares. The total number consenting were 9911, and without defendant's consent, much less than the three-fourths would have been obtained. The other consenting stockholders are widely scattered, have small holdings, and are presumably the persons originally induced to buy the same by defendant or its associates. At a meeting of common stockholders held May 5, 1922, the mortgage bond issue was authorized and the contract with A. B. Leach & Company submitted and approved. The only stockholders present in person were the President of the corporation, who also owned a controlling interest in its common stock, the Vice President and Treasurer, who was the son of the President, the corporation's Secretary, and the bank official already mentioned as urging a bond issue to refund bank debts. None of them appear in the list of preferred stockholders.

The transaction was carried out as planned. The defendant took the entire issue of bonds at 90-1/2 and accrued interest. It exchanged for bonds, 3,000 shares of its preferred stock at 85 and accrued dividends. For 3,000 shares of preferred stock at 85 and accrued dividends, it received, without other consideration, bonds at 90-1/2. The money borrowed from defendant to pay the February 1, and from some one else to pay the May 1, dividends on the preferred stock, was paid back from the proceeds of the bond sales. No dividend was later ever declared or paid on the preferred stock. Interest was paid on the bonds up to and including May 1, 1924, but the following November 1 instalment was not paid, and thereupon the present Receiver was appointed. To what extent the corporation's capital was then impaired, or whether it was then or is now insolvent, does not appear in the record.

Plaintiff's action as Receiver is to compel defendant to account for the bonds received, for which it gave nothing except an attempted surrender of its preferred stock, and also the instalments of interest paid on such bonds.

The foregoing statement of undisputed facts plainly indicates the judgment proper to be rendered. Counsel have orally and in briefs covered a wide range of corporation law and have cited numerous authorities. Every proposition, with its supporting argument and authorities, has been studied and given my best consideration. Some independent lines of inquiry and additional authorities have also been studied. Obviously, it is impossible to discuss all the propositions advanced and relied on or to review fully the authorities cited and examined. My duty to other litigants forbids my doing more than announcing my conclusions, with a brief statement of some of the supporting reasons.

In my opinion, the delivery by the Struthers Furnace Company to A. B. Leach & Company of its first mortgage bonds at 90-1/2 and accrued interest in exchange for no other consideration than 3,000 shares of preferred stock at 85 and accrued dividends, is illegal and, under the facts of this case, is also a fraud upon creditors and other preferred stockholders. Section 8668 G. C. provides that dividends on preferred stock may be paid "out of the surplus profits of the company each year in preference to all other stockholders." Section 8724 forbids any corporation organized under the laws of this State from paying dividends except from surplus profits arising from its business. Such is the general and unalterable rule. In this instance, the company's charter and its issued certificates expressly provided that preferred stock should be redeemed only out of surplus profits, and that, beginning January 1, 1922, the corporation should, for the next five years set aside to redeem and retire said preferred stock, not less than ten per cent., and for the next five years, not less than fifteen per cent., and for each year thereafter, not less than twenty per cent. "of the net surplus profits of the company for the preceding year remaining after payment of preferred dividends and all taxes, including any state or federal income or excess profits taxes." It is reiterated many times that all redemption or retirement of preferred stock is to be made only from these net surplus profits. These charter provisions are exclusive

and controlling. The corporation cannot be permitted to do indirectly, under the guise of a purchase of preferred stock, that which it is forbidden to do directly.

Defendant asserts an additional right of purchase by virtue of the last paragraph of Section 8669, added in 1917. In my opinion, this contention is not tenable. Aside from the controlling consideration that the charter expressly provides otherwise, I think the language of said paragraph does not support defendant's contention. That part of the Section applies only when the charter has not otherwise expressly dealt with the subject. But even in cases when it does apply, it is a permission to redeem preferred stock by purchase, or by exchange for common stock, and not an authority to the corporation to buy and sell its own stock. It permits redemption by such purchase or exchange only on such terms as may from time to time be proposed by the Board of Directors and accepted by the holders thereof. The terms must be proposed to all the preferred stockholders and not by the Board of Directors to some favored insider. It is essential to redemption that stock so bought for that purpose, shall be cancelled and retired. For this and other reasons I am of opinion that the 1917 amendment was not intended to change or modify the long prevailing and well established Ohio rules pertaining to the right of a corporation to buy back its own stock.

An Ohio corporation may not deplete or reduce its contributed capital by giving back a part of it to some one or more stockholders under any guise, whether it be the cancellation of an unpaid stock subscription or the purchase of stock fully paid for. This results not merely from the prohibition to pay dividends otherwise than from surplus profits, but also from the well settled Ohio rule as to the trust fund theory of a corporation's contributed capital, and from the limitation upon its powers, which does not include the right to use its assets to buy or deal in its own stock, except to the extent expressly conferred. Notwithstanding the 1917 amendment, the law in Ohio is still that stated in the following cases: *State vs. Building Ass'n,* 35 O. S. 258; *Coppin vs. Greenlees,* 38 O. S. 275; *Gates vs. Tippecanoe Stone Co.,* 57 O. S. 60; *Mining Co. vs. Mfg. Co.* (6 C. C. A.) 62 Fed. 356; *Railway Co. vs. Iron Co.,* 46 O. S. 44; *Niles vs. Olszak,* 87 O. S. 229. In this respect, Ohio is in line

with the so-called English rule on the subject. Defendant cites, however, *Siders vs. Concrete Co.*, 13 C. C. (n. s.) 481, affirmed, 87 O. S. 519, as in conflict, but I do not so understand that case. It is true, some language is used in the Court of Appeals' opinion which, at a hasty glance, might indicate a view different from that above stated, but upon the facts, the case was the simple one of a corporation buying some outstanding shares, giving its note for the purchase price, and then reselling the stock, and when sued on the note, defending on the ground that the transaction was *ultra vires*. Having resold the stock and received the purchase price, it could not refuse to pay its outstanding note. In the Supreme Court, the affirmance was on the ground that the decision below had involved the weight of the evidence and therefore the judgment was not subject to review. This understanding of the Ohio decisions accords with the understanding of all text writers on Corporations who have studied the Ohio cases. See *Fletcher on Corporations*, Sec. 1135; 14 Cor. Jur. A, p. 297; note, 33 Amer. St. Rep., 345; all of whom say that the Ohio rule is the same as the English rule. I think it not too much to say that the consensus of opinion among Ohio lawyers is and has always been to the same effect.

Certain exceptions to the general rule are recognized in Ohio and elsewhere, of which the Siders case above cited, furnishes one illustration. The transaction now under inquiry is within no exception known to me. The Struthers Furnace Company, when the transaction took place, and had no surplus profits. On the contrary, at that time its contributed capital had been impaired. The Board of Directors and the common stockholders were not disposing of surplus profits which were under their control and might have been paid out as dividends. If there are surplus profits applicable to the payment of dividends, it may well be that a Board of Directors, with the consent or acquiescence of other stockholders, might divert those dividends to the purchase of capital stock, and, if creditors were not prejudiced, no one would have any right to complain. It is difficult to see how directors and common stockholders having control of the corporation, might do so without the knowledge or consent of preferred stockholders who have a prior right to a fixed cumulative dividend out of surplus earnings. In this case they had no voting power and were not consulted, and hence, even if there were surplus prof-

its from which the preferred stock might have been bought without impairing capital, the directors and common stockholders would have no right to take it away from the preferred stockholders except by their consent or acquiescence. In those jurisdictions where it is held that the general rule, in the absence of a charter or statutory prohibition is that a corporation has power to buy its own stock, there are likewise many well established exceptions which forbid the purchase.

In my opinion, the transaction under investigation is within those exceptions and would be held invalid in most, if not all, of the jurisdictions announcing a rule different from the Ohio rule. Aside from the fact that there were no surplus profits, there were also existing creditors in large amounts whose debts were in part refunded by this bond issue. The bonds became an outstanding debt, coincidentally at least, with the effort to retire this preferred stock, and in as much as the bonds were issued with the knowledge of defendant to refund prior existing debts, the new bonds are entitled to the status accorded to existing creditors when one comes to consider the validity of the attempt to buy back stock. The transaction with respect to this preferred stock was secret and not made a matter of public record. In that situation, the rights of future creditors are or may be, as in this case they were, prejudiced by the transaction.

Under these special conditions, the rule permitting a corporation to buy its stock is held not to apply, or, in other words, the transaction is within the exceptions rather than the rule. See I *Cook on Corporations,* 6th ed. Sec. 311; 14 Cor. Jur. A. p. 280. Mr. Cook says: "if stockholders do not object, there is no reason why the net profits of a corporation should not be applied to purchasing its stock, instead of being used for a dividend." This is the rationale of the rule. Obviously the reason does not apply if there are creditors and no net profits, or if, as in this case, part of the stockholders whose interests were especially prejudiced, are not given the opportunity to consent or object. Mr. Cook further says: "If the corporation is insolvent at the time of the purchase, it is clearly an invalid transaction and will be set aside. The rule goes still further, and declares that if a corporation, by a purchase of shares of its own capital stock, thereby reduces its actual assets below its capital stock and debts, or if the actual assets

at that time are less than the capital stock and debts, such purchase may be set aside, and the guilty corporate officers, as well as the vendor of the stock, may be rendered liable thereon at the instance of a corporate creditor." In the present case, the corporation, if not insolvent, was at least with an impaired capital and its assets were reduced below its capital stock and debts by the transaction in question. Nor do I understand the right of complaint is limited to corporate creditors alone. Other stockholders, if prejudiced, have an equal right to complain, unless they are barred by consent, or its equivalent, an equitable estoppel.

The Ohio rule, as well as these exceptions to the other rule, flows of necessity from the trust fund theory of the contributed capital of a corporation. Wherever that theory of the law is recognized, any transaction whereby a corporation seeks to return to a stockholder any part of its contributed capital, is invalid. This is equally true whether the attempt is made under the guise of cancelling an unpaid subscription or permitting it to be paid for otherwise than in accordance with the law on the subject, or whether it is under the guise of buying back a part of its capital stock. In substance and effect, no difference exists between cancelling an unpaid subscription and returning that subscription after it has been paid. That the trust fund theory is the law of Ohio and of this forum, will appear from the following cases: *Thoms & Brenneman vs. Goodman* (6 C. C. A.) 254 Fed. 39, 41; *Sawyer vs. Hoag,* 17 Wall. 610; *Upton vs. Tribilcock,* 91 U. S. 45, 47; *Sanger vs. Upton,* 91 U. S. 56, 60; *Farrington vs. Tennessee,* 95 U. S. 679, 686; *Clark vs. Bever,* 139 U. S. 96, 109; *Handley vs. Stutz,* 139 U. S. 417, 426. The same principles are reflected in Sec. 8684 G. C., which forbids an Ohio corporation to employ its assets or other property directly or indirectly for any other purpose than to accomplish the legitimate objects of its creation. The extent to which this doctrine is carried, will be seen by examining *Railway Co. vs. Iron Co.,* 46 O. S. 44; *Mining Co. vs. Mfg. Co.* (6 C. C. A.) 62 Fed. 356. Here, in substance and effect, the transaction is nothing more nor less than a secret effort of one preferred stockholder, with the co-operation and consent of the Board of Directors, and it may be also of the common stockholders, to divert a part of the contributed capital from the corporate objects and purposes and use it for the personal advantage of that stockholder. In

so doing, the Directors, and, if need be, common stockholders, were dealing with property on which creditors and preferred stockholders had a prior claim or demand. It was beyond the power of the Board of Directors, acting with or without the approval of the common stockholders, to divert corporate assets to this use and purpose. The transaction violates numerous principles of corporation law and most of the principles of justice and honesty.

To sustain the transaction would be to sanction a gross fraud upon other preferred stockholders. In Ohio, preferred stock is, in substance, a liability of the corporation. See *Miller vs. A. D. Baker Co.* (D. C.) 208 Fed. 190. No preferred stockholder other than defendant, was advised of the transaction when their waivers were solicited by defendant and by officers of the corporation. They consented to waive their priority in favor of the mortgage bond issue upon representations made to them in which defendant joined and under a belief that the proceeds were to go into the treasury of the corporation to pay debts or to be used for working capital, or for some corporate purpose. They were not consenting that A. B. Leach & Company, from whom they had bought their preferred stock, should have its 3,000 shares returned to it out of the proceeds of that bond issue. They were not consenting that the large and powerful and inside preferred stockholder, upon whom they relied in buying their stock, should exchange its stock for a first mortgage on the corporation's assets. It is not conceivable that they ever would have consented to waiving their priority in favor of a mortgage to secure A. B. Leach & Company. The representations made by the officers of the Furnace Company and by A. B. Leach & Company to preferred stockholders to procure their consents, and the failure of both to disclose the private advantage to be given to defendant, constitutes a gross form of fraud and unfair dealing.

Nor can the transaction be sustained from the point of view of creditors. All the authorities agree that any transfer by a corporation of any part of its capital assets to one of its stockholders, or any mortgage given to any of its stockholders for the purchase price of its stock, is invalid, if the rights of creditors are thereby injured or prejudiced. There is some difference as to whether creditors becoming such subsequent to the trans-

action, have any right to complain. This difference in the authorities will not be discussed, because no opinion with respect thereto need be expressed. In this case, for reasons already stated, the outstanding bonds, being given to take up preexisting debts, are entitled to rank as existing creditors with respect to this transaction. The most that can be said to the contrary is that this transaction is contemporaneous with the creation of the bond issue and not that the bonds are created later. No buyer of bonds, except defendant, was advised that a large part of the proceeds was to go to one preferred stockholder for the purpose of returning to him his contribution to the corporate capital. Defendant, when buying these bonds, knew the terms of its own contract. It was mutually expected that defendant would not keep the bonds but would sell and distribute them to the general public, as it had previously done with the preferred stock. Every buyer of a bond, under the circumstances appearing in the record, had a right to expect that none would be issued except for money or its equivalent, and that this money would be turned into the treasury of the corporation and used for proper corporate purposes. Every bondholder had then and has now an interest in bringing about this result. The security back of his bond, as well as the future success of the corporation, gives him a right to compel this result. It is and was a fraud upon each and every buyer of a bond, to sell the same to him upon a representation that the entire proceeds were to pay a floating debt, furnish working capital, or be used for some like corporate purpose, without disclosing the fact that a part of the bonds was to be diverted to defendant in an attempt to cancel preferred stock. In this aspect, a creditor's right to relief rests upon a stronger foundation than in many cases in which subsequent creditors have been permitted to recover back capital assets transferred to a creditor in an effort to extinguish his shares. See the following: *Coleman vs. Tepel,* (3 C. C. A.) 230 Fed. 63; *Hamor vs. Taylor-Rice Eng. Co.* (C. C.), 84 Fed. 393; *Clark vs. Clark Mchy. Co.,* 151 Mich. 417; *Crandall vs. Lincoln,* 52 Conn. 731; 52 Amer. Rep. 560; *A. & W. etc. Ass'n vs. Smith* (Wis.), 135 Amer. St. 42; *Commercial Nat'l Bank vs. Burch,* 141 Ill. 519.

No difficulty is perceived in giving the relief prayed for. Defendant, among other things, contends that the Receiver represents merely the corporation, which is estopped by its conduct to complain; that defendant's

purchase of the bond issue was an entire contract, and that to compel the return of a part of the bonds would be making for it a new contract; and that the corporation, having received and retained the proceeds of the bond sales, is not entitled to relief because the parties cannot be restored to their former position. These contentions have received due consideration.

The plaintiff Receiver occupies a different position than the corporation. He represents and is entitled to enforce any and all rights that any creditor has or might enforce. He represents also the rights of the preferred stockholders who, under the terms of the charter and the laws of Ohio, are more nearly assimilated to creditors than to common stockholders. That which is complained of was done without the knowledge, consent, or acquiescence of creditors or preferred stockholders. The defendant, however, had full knowledge of the terms under which this preferred stock had been issued and on which it might be redeemed. It had knowledge of the impaired financial condition of the corporation. It took an active and knowing part in the course of conduct herein found to be illegal and fraudulent as to preferred stockholders and creditors whereby bonds were delivered to it without other consideration than an ineffectual attempt to surrender 3,000 shares of preferred stock. The rights of innocent creditors and of other innocent preferred stockholders are not to be waived by the Board of Directors or by the silence or acquiescence of common stockholders. It should not be forgotten that the right of corporate control was reserved to common stockholders and that the preferred stockholders had no right to vote or to participate in the management. In this respect, they were as helpless as creditors. Persons having control of a corporation, sustain to them a fiduciary relationship quite equal to that sustained to creditors.

In substance, nothing happened to defendant's 3,000 shares of preferred stock as a result of this transaction. In equity, if not at law, the title thereto has at all times been in the defendant. The corporation's lack of power and the defendant's imputed, if not actual knowledge, leaves the equitable title, at least, where it has always been. A. B. Leach & Company, as to these 3,000 shares, has never ceased to be a preferred stockholder. No rescission or cancellation, as between the defendant and the corporation, is necessary to grant relief.

Nor, in my opinion, has the corporation received from the defendant or now has anything belonging to the defendant, which it is necessary to restore. Defendant bought bonds at 90½ and accrued interest. As to a certain part of those bonds, it paid nothing to the corporation. It merely made an ineffectual attempt to settle therefor by surrendering certificates for 3,000 shares of preferred stock. It has, in effect, received certain corporate assets charged with a trust in favor of creditors and preferred stockholders. It has, in effect, received and still possesses certain bonds or the proceeds thereof, which are a trust fund and for which it must account. If defendant now had these bonds, full equity would be done by requiring their surrender and cancellation, with the payment back of any and all interest heretofore paid thereon by the corporation. It is admitted in defendant's answer that it has sold all the bonds and has received the money. Equity therefore requires that it should account for that money upon the theory that it has received property of the corporation charged with a trust, and, having converted the same, must account for the proceeds.

In the presence of a situation so simple, it is unnecessary to discuss the law of *ultra vires* or the doctrine of estoppel against a corporation, or the equitable principles of partial rescission with compensation, or the law of separable and entire contracts. As to the doctrine of *ultra vires*, the law of this forum is summed up in *Central Transportation Co. vs. Pullman Palace Car Co.*, 139 U. S.. 24, 54, 58, 59-60. See also *De La Vergne Co. vs. German Sav. Inst.*, 175 U. S. 58; *West Penn Chemical Co. vs. Prentice* (3 C. C. A.) 236 Fed. 891; *Mining Co. vs. Mfg. Co.* (6 C. C. A.) 62 Fed. 356; *Commissioners vs. State of Ohio*, 78 O. S. 287.

Judgment will be rendered for plaintiff for the sum of $255,000 and all interest heretofore paid on the bonds represented by said sum. Interest thereon may be calculated to the first day of this term of court, and judgment entered for the aggregate sum. Costs will follow this judgment. As an equitable favor, defendant will be permitted to pay said judgment, except costs, in mortgage bonds of the issue in question, whether now owned or hereafter acquired, provided such payment is made within thirty days from the date of entry of this judgment. If not so paid, execution may issue, solvable only in legal tender.

D. C. Westenhaver,

March 1, 1926. *Judge.*

FINAL DECREE.

(Entered March 18, 1926, by D. C. Westenhaver, Judge.)

This cause came on to be heard upon the petition of the plaintiff, Hugh W. Grant, Receiver of The Struthers Furnace Company, the amended answer of the defendant, A. B. Leach & Company, Inc., and the reply of the plaintiff to said amended answer, and was tried to the Court upon evidence and submitted upon oral argument and brief of counsel.

Upon consideration whereof, the Court finds that the exchange of bonds of The Struthers Furnace Company for three thousand shares of the preferred stock of said Company was beyond the power of the corporation and its directors to accomplish and was void; and that it constituted an unlawful transfer of the corporation assets and accomplished a fraud to the detriment of the bondholders, stockholders and creditors of the corporation, and that the defendant, A. B. Leach & Company, Inc., is liable and obligated in equity to account to the plaintiff for the face value of the first mortgage gold bonds unlawfully exchanged by The Struthers Furnace Company with A. B. Leach & Company, Inc., for three thousand shares of the preferred stock of said Company held by A. B. Leach & Company, Inc., to the extent of the value placed upon said preferred stock in the exchange, that is

Two Hundred and Fifty-five Thousand ($255,000.00) Dollars, with interest from May 1, 1922, to February 2, 1926, the first day of the present term of court, at six per cent. per annum, said principal sum and interest amounting on the first day of this term of court, to-wit, February 2, 1926, to Three Hundred Twelve Thousand and Three Hundred Seventy-five ($312,375.00) Dollars.

The Court further finds that The Struthers Furnace Company paid the interest coupons upon Two Hundred Fifty-five Thousand ($255,000.00) Dollars of the face value of said bonds as follows, to-wit:

November 1, 1922	$10,200.00
May 1, 1923	10,200.00
November 1, 1923	10,200.00
May 1, 1924	10,200.00

and that the interest on said respective amounts from said respective dates, at six per cent. per annum, up to February 2, 1926, the first day of the present term of court, together with the principal, amounts to Forty-six Thousand Nine Hundred Twenty ($46,920.00) Dollars.

Wherefore, it is ordered, adjudged and decreed, and judgment is hereby rendered in favor of the plaintiff and against said A. B. Leach & Company, Inc., in the sum of Three Hundred Twelve Thousand Three Hundred Seventy-five ($312,375.00) Dollars.

It is further adjudged and decreed, by way of alternative decree, that if the said defendant, A. B. Leach & Company, Inc., shall surrender to The Guardian Savings & Trust Company, Trustee, for cancellation, any amount of said first mortgage gold bonds issued by The Struthers Furnace Company, in such denominations as the defendant may be able to procure the same, up to the amount of Two Hundred Fifty-five Thousand ($255,000.00) Dollars, face value thereof, together with the unpaid interest coupons attached thereto, within thirty days from the entry of this decree, or in the event that an appeal is allowed from this decree and perfected and a supersedeas bond filed and approved, then within thirty days from the filing of the mandate issued by the court or courts to which such appeal is taken, and shall at the same time and within the said time limits pay to the plaintiff Receiver the amount of the interest paid by The Struthers Furnace Company upon said bonds so surrendered and deposited, together with interest thereon at six per cent. per annum, to the date of such payment, then the face value of said bonds so surrendered, but not of the unpaid coupons thereon, shall be credited upon the principal of said judgment, to-wit, upon Two Hundred Fifty-five Thousand ($255,000.00) Dollars, and the remainder of said principal of said judgment shall bear interest at the rate of six per cent. per annum, from and after May 1, 1922, to the second day of February, 1926, and the total of said judgment, if any, remaining unpaid, shall bear interest at the legal rate computable upon judgment from February 2, 1926, to date of payment.

It is ordered that the three thousand shares of preferred stock heretofore deposited with the Clerk of this Court shall remain in the custody of the Clerk, subject

to the order of A. B. Leach & Company, Inc., upon their compliance with the terms of this decree, and judgment is rendered for the plaintiff herein against the defendant for the costs of this action. To all of which the defendant, by its attorneys, excepts.

Approved:

WILSON, HAHN, HENDERSON & WILSON,
Attorneys for Plaintiff.

PETITION FOR APPEAL.

(Filed April 21, 1926.)

To the Honorable D. C. Westenhaver, Judge in said Court and Cause Presiding:

Now comes A. B. Leach & Company, Inc., a Corporation, the above named defendant by Day & Day and Newman, Poppenhusen, Stern & Johnston, its attorneys and feeling itself aggrieved by the final decree of this Court entered herein on the 18th day of March A. D. 1926, hereby prays that an appeal may be allowed to the said defendant from the said decree to the Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and that a complete transcript of the record, proceedings and evidence upon which said decree is based, duly authenticated, may be sent to the Clerk of the Circuit Court of Appeals for the Sixth Circuit; that an Order of Supersedeas may be entered herein pending the final disposition of the cause and that the amount of security may be fixed by the order allowing this appeal.

NEWMAN, POPPENHUSEN, STERN & JOHNSTON,
DAY & DAY,
Solicitors for Defendant.

ASSIGNMENT OF ERRORS.

(Filed April 21, 1926.)

Now comes the Appellant, A. B. Leach & Company, Inc., a Corporation, by Day & Day, and Newman, Poppenhusen, Stern & Johnston, its Solicitors, and in connection with its Petition for Appeal says, that in the record and proceedings and in the final decree aforesaid, manifest error has intervened to the prejudice of the Appellant, in that:

1. The court erred in finding that "the exchange of bonds of The Struthers Furnace Company for three thousand (3000) Shares of the Preferred Stock of said company was beyond the power of the Corporation and its Directors to accomplish and was void."

2. The court erred in finding that "the exchange of bonds of The Struthers Furnace Company for three thousand (3000) Shares of the Preferred Stock of said Company * * * constituted an unlawful transfer of the corporation assets."

3. The court erred in finding that "the exchange of bonds of The Struthers Furnace Company for three thousand (3000) shares of the Preferred Stock of said Company * * * accomplished a fraud to the detriment of the Bondholders, Stockholders and Creditors of the corporation" or any of them.

4. The court erred in finding that the Defendant, A. B. Leach and Company, Inc., "is liable and obligated in equity to account to the Plaintiff."

5. The court erred in finding that the Defendant, A. B. Leach & Company, Inc., "is liable and obligated in equity to account to the Plaintiff for the face value of the First Mortgage Bonds * * * exchanged by The Struthers Furnace Company with A. B. Leach & Company, Inc., for three thousand (3000) Shares of the Preferred Stock of said company held by A. B. Leach & Company, Inc., to the extent of the value placed upon said Preferred Stock in the exchange, that is, Two Hundred Fifty Five Thousand ($255,000.00) Dollars, with interest from May 1, 1922 to February 22, 1926 * * * at six per cent (6%) interest per annum" or to any other extent whatsoever.

6. The court erred in rendering a judgment or decree in favor of the Plaintiff against A. B. Leach &

Company, Inc., in the sum of Three Hundred Twelve Thousand, Three Hundred Seventy Five ($312,375.00) Dollars, or in any sum whatsoever.

7. The court erred in not holding that Plaintiff had no authority to institute or maintain the suit or proceedings herein against the Defendant, A. B. Leach & Company, Inc.

8. The court erred in not holding that the Plaintiff was estopped to claim that the exchange of bonds for Preferred Stock of The Struthers Furnace Company pursuant to the contract between said Company and A. B. Leach & Company, Inc., was *ultra vires,* the said The Struthers Furnace Company, or in any other respect unlawful, void or voidable.

9. The court erred in not holding that the Plaintiff was guilty of such laches as debarred him from any relief in a court of equity.

10. The court erred in not holding that the contract of April 15, 1922 between A. B. Leach & Company, Inc., and The Struthers Furnace Company for the purchase of the latter's bonds by the former, pursuant to which three thousand (3000) shares of Preferred Stock in The Struthers Furnace Company were assigned and delivered by A. B. Leach & Company, Inc., in part payment of said bonds, was an entire contract which could not be rescinded by the Plaintiff except upon his tendering to the Defendant a sum of money equal to the money paid to The Struthers Furnace Company by A. B. Leach & Company, Inc., subject to any adjustment between the parties on account of interest, as well as the shares of Preferred Stock so assigned and delivered by the said A. B. Leach & Company, Inc., to The Struthers Furnace Company.

11. The court erred in not holding that that part of the contract between The Struthers Furnace Company and A. B. Leach & Company, Inc., for the purchase by the latter of the former's bonds to an amount of One Million Five Hundred Thousand ($1,500,000.00) Dollars, which provided A. B. Leach & Company, Inc., should have the right to take and pay for any part of Four Hundred Fifty Thousand ($450,000.00) Dollars Par Value of said bonds on the following basis:

> "For every Fifteen Hundred Dollars ($1500.-00) Par Value Bonds at the price of Ninety per cent (90%) and accrued interest, there shall be paid ten

(10) shares of the Furnace Company's Preferred Stock at Eighty Five Dollars ($85.00) per share and accrued dividend, the balance to be paid in cash."

could not be separated from the other part of said contract and that there could be no rescission of said contract by the Plaintiff without his returning to A. B. Leach & Company, Inc., not only the Shares of Preferred Stock delivered by said Defendant to The Struthers Furnace Company, but also the money paid by A. B. Leach & Company, Inc., to The Struthers Furnace Company pursuant to said provision, less any adjustment on account of interest due to either party.

12. The court erred in not holding that the Defendant, A. B. Leach & Company, Inc., could not be placed in statu quo and that Plaintiff was not entitled to any relief in a court of equity.

13. The court erred in not holding that the measure of Plaintiff's damages, if any, was the difference, if any, between the fair market value of the Preferred Stock of The Struthers Furnace Company assigned and transferred by A. B. Leach & Company, Inc., pursuant to the latter's contract with the former for the purchase of the bonds, at the time of delivery or on the date of said contract, and the value of said Preferred Stock fixed in said contract.

14. The court erred in not holding that the measure of Plaintiff's damages, if any, was the difference, if any, between the reasonable value of the bonds of The Struthers Furnace Company of the face value of Two Hundred Fifty Five Thousand ($255,000.00) Dollars and the reasonable value of the three thousand (3000) shares of the Preferred Stock of The Struthers Furnace Company delivered to The Struthers Furnace Company by A. B. Leach & Company, Inc., in part payment of the latter's purchase of the former's bonds of the face value of One Million Five Hundred Thousand ($1,500,000.00) Dollars, less any adjustment on account of interest found due to either party from the other.

15. The court erred in not holding that The Struthers Furnace Company had sustained no damage by reason of its having accepted the Preferred Stock surrendered to it by A. B. Leach & Company, Inc., in part payment of the latter's contract for the purchase of the former's bonds.

16. The court erred in not holding that it would be unconscionable and inequitable to enter a decree against the Defendant in the sum of Three Hundred Twelve Thousand Three Hundred Seventy-five ($312,375.00) Dollars or in any other sum upon Plaintiff's mere tender of the shares of Preferred Stock delivered to The Struthers Furnace Company by A. B. Leach and Company, Inc.

17. The court erred in not holding that Plaintiff represented only The Struthers Furnace Company and that he had no other or greater rights than said Company.

18. The court erred in not holding that under the Laws of the State of Ohio, The Struthers Furnace Company could lawfully receive the Shares of Preferred Stock in said company delivered to it by A. B. Leach and Company, Inc., in part payment of the latter's contract with the former for the purchase of the former's bonds pursuant to the terms of said contract.

19. The court erred in not holding that under the charter of The Struthers Furnace Company, the certificates of Preferred Stock, and the laws of the State of Ohio, The Struthers Furnace Company could lawfully receive in part payment of its bonds three thousand (3000) shares of Preferred Stock from A. B. Leach & Company, Inc., as provided in the contract of April 15, 1922, and the resolutions that were adopted by The Struthers Furnace Company pursuant thereto.

20. The court erred in not holding that The Struthers Furnace Company had, under the laws of the State of Ohio, and under the provisions of its charter, the express terms of the certificates of Preferred Stock, and the resolutions and by-laws of the Company, the option and power to redeem its said Preferred Stock, in whole or in part, by purchase thereof by the corporation upon such terms as were proposed and adopted by the Board of Directors of The Struthers Furnace Company and accepted by A. B. Leach and Company, Inc., the holder of three thousand (3000) shares of said Preferred Stock.

21. The Court erred in holding that the plaintiff, as Receiver of The Struthers Furnace Company, represented and could enforce the claims or rights, if any, of the holders of Preferred Stock (other than A. B. Leach and Company, Inc.,) of The Struthers Furnace Company.

22. The Court erred in holding that the Plaintiff, as Receiver of The Struthers Furnace Company, represented and could enforce the claims or rights, if any, of the present creditors of The Struthers Furnace Company.

23. The court erred in holding that it was provided in the charter of The Struthers Furnace Company and the certificates of Preferred Stock that said certificates could be redeemed only from the net surplus profits left at the end of each year after a payment of the agreed Preferred dividend and all taxes.

24. The court erred in not dismissing the Plaintiff's Bill for want of equity.

25. The court erred in rendering judgment for the Plaintiff against the Defendant for costs.

26. There are other plain errors of the court apparent on the face of the record not hereinbefore specifically assigned.

Wherefore, Defendant prays that the said decree be reversed and remanded with directions to dismiss Plaintiff's Bill of Complaint for want of equity or that the District Court proceed in accordance with the law and with such other directions as to this Honorable Court shall appear to be meet and proper.

NEWMAN, POPPENHUSEN, STERN & JOHNSTON,
DAY & DAY,
Solicitors for Petitioner and Appellant.

ORDER ALLOWING APPEAL.

(Entered Apr. 21, 1926, by D. C. Westenhaver, Judge.)

This matter having come on to be heard in open court upon the petition of A. B. Leach & Company, Inc., defendant herein, for an appeal from the final decree of

the Court entered herein on the 18th day of March, A. D. 1926, to the Circuit Court of Appeals for the Sixth Circuit; and the said defendant having prayed that the amount of security to be given by it be fixed by this Court, and that an order of supersedeas be entered, and the defendant having filed its assignment of errors and presented the same to the Court with its petition for appeal;

It is Ordered, Adjudged and Decreed, that said appeal be and the same hereby is allowed upon the said defendant's filing its appeal bond herein in the sum of Three Hundred Seventy-five Thousand Dollars ($375,000.00), conditioned as required by law and with surety to be approved by the Court forthwith, and that thereupon said appeal shall operate as a supersedeas.

BOND ON APPEAL.

(Approved and filed Apr. 21, 1926.)

Know All Men by These Presents, That we, A. B. Leach & Company, Inc., a corporation, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Hugh W. Grant, as Receiver for The Struthers Furnace Company, a corporation, in the full and just sum of Three Hundred Seventy-five Thousand ($375,000.00) Dollars, to be paid to the said Hugh W. Grant, as Receiver for The Struthers Furnace Company, a corporation, his certain attorneys, successors or assigns: to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-six.

WHEREAS, lately at a session of the District Court of the United States for the Eastern Division of the Northern District of Ohio, in a suit pending in said Court, between Hugh W. Grant, as Receiver for The Struthers Furnace Company, a corporation, a judgment or decree was rendered against the said A. B. Leach & Company, Inc., a corporation, and the said A. B. Leach & Company, Inc., a corporation having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment or decree in the aforesaid suit, and a citation directed to Hugh W. Grant, as Receiver for The Struthers Furnace Company, a corporation, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the 21st day of May, next.

NOW THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said A. B. Leach & Company, Inc., a corporation, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

A. B. Leach & Company, Inc.,
By Day & Day,
Its Attys. and Attys. in fact.

Fidelity & Deposit Company of Maryland,
By Philip Laurenson (Seal)
Attorney in fact.

Sealed and delivered
in Presence of
Donald W. Kling,
H. J. Darley.

Approved by

D. C. Westenhaver,
United States District Judge.

CITATION.

The President of the United States, to Hugh W. Grant, as Receiver for The Struthers Furnace Company, a Corporation, Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Sixth Circuit, at the City of Cincinnati, within 30 days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States in and for the Northern District of Ohio, Eastern Division, and filed in the Clerk's office of said Court on the 21st day of April, A. D. 1926, in a cause wherein A. B. Leach & Company, Inc., a corporation, is appellant and you appellee, to show cause, if any, why the decree rendered against the appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable William Howard Taft, Chief Justice of the United States, this 21st day of April, A. D. 1926.

D. C. WESTENHAVER,
District Judge.

ATTEST:

B. C. MILLER,
Clerk (Seal)

By G. L. PATTERSON,
Deputy Clerk.

Apr. 22, 1926. Service of the above citation is hereby acknowledged and appearance of appellee is hereby entered.

J. P. WILSON & A. M. HENDERSON,
Solicitors for Appellee.

STIPULATION RE CERTIFICATION OF RECORD.

(Filed April 21, 1926.)

In accordance with Section 7 of Rule 44 of the general rules of this Court, it is hereby agreed that the record as presented to the Clerk by the printer, may be certified by the Clerk as required by law and the rules of the Appellate Court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

J. P. Wilson & A. M. Henderson,
Attorneys for Plaintiff.

Day & Day,
Newman, Poppenhusen, Stern & Johnston,
Attorneys for Defendant.

PRAECIPE.

(Filed April 21, 1926.)

To the Clerk of the Above Entitled Court:

You will please prepare transcript of the record in this cause for the Circuit Court of Appeals for the Sixth Circuit on the appeal of the above named defendant heretofore allowed, and included in such transcript the following pleadings, orders and papers on file, to-wit:

Plaintiff's bill of complaint.
Defendant's answer.
Defendant's amended answer.
Plaintiff's reply.
The final decree.
Court's opinion.

The petition for appeal.

Assignment of errors.

The order allowing appeal and fixing amount of supersedeas bond.

Supersedeas bond.

Defendant's motion that certain portions of the testimony be reproduced in the exact words of witnesses in the statement of evidence.

Order directing that certain testimony be reproduced in the exact words of witnesses.

Statement of the evidence.

Order approving statement of evidence.

Stipulation in Statement of the Evidence just preceding Court's certificate, together with Court's certificate.

Praecipe for transcript of record.

Citation with endorsement.

Stipulation regarding printed transcript.

Clerk's certificate.

You will please deliver all papers to The Gates Legal Publishing Company, Blackstone Building, Cleveland, Ohio, for printing.

We hereby agree that the above and foregoing praecipe is correct; that the records, documents, papers and proceedings therein set forth are sufficient for a compete record in this cause on appeal, and we hereby adopt the foregoing as a list designated by each of the parties to this cause to complete said transcript, and we hereby waive the issuance and service of notice upon any party hereto, and agree that said praecipe shall be obeyed by, and acted upon by, the clerk as fully and to all intents and purposes in the same manner as if said praecipe had been regularly filed and a true copy thereof served upon each party hereto.

Dated: April 21, 1926.

NEWMAN, POPPENHUSEN, STERN & JOHNSTON,
DAY & DAY,
Solicitors for Defendant, A. B. Leach and Company, Inc.

J. P. WILSON & A. M. HENDERSON,
Solicitors for Plaintiff, Hugh W. Grant as Receiver for The Struthers Furnace Company.

ORDER EXTENDING TIME FOR FILING RECORD.

(Entered May 19, 1926, by D. C. Westenhaver, Judge.)

For satisfactory reasons appearing to the Court, the time for filing the record in this cause in the Circuit Court of Appeals for the Sixth Circuit, pursuant to the appeal sued out, is extended until the 5th day of June, 1926.

SUPPLEMENTAL PRAECIPE.

(Filed May 19, 1926.)

To the Clerk of the above entitled Court:

In the preparation of the Transcript of the Record in this cause for the Circuit Court of Appeals for the Sixth Circuit on the appeal of the above named defendant heretofore allowed, you will please include in such transcript an order made by the Honorable D. C. Westenhaver, a Judge of this Court, extending the time for filing said record and deliver said order, together with this supplemental praecipe, to The Gates Legal Publishing Company, Blackstone Building, Cleveland, Ohio, for printing.

We hereby agree that this supplemental praecipe and the order extending the time for filing the record of this cause should be included in the printed record, as a part thereof, for the purpose of making said record complete, and we hereby waive the issuance and service of notice of the filing of this supplemental praecipe, and that it shall be obeyed by, and acted upon by, the clerk as fully and to all intents and purposes in the same man-

ner as if said supplemental praecipe had been regularly filed and a true copy thereof served upon each party hereto.

NEWMAN, POPPENHUSEN, STERN & JOHNSTON,
and
DAY & DAY,
Solicitors for the Defendant,
A. B. Leach & Co., Inc.

JAMES P. WILSON,
and
A. M. HENDERSON,
Solicitors for the Plaintiff,
Hugh W. Grant as Receiver for
The Struthers Furnace Company.

CERTIFICATE OF CLERK.

Northern District of Ohio, ss:

I, B. C. Miller, Clerk of the United States District Court within and for said District, do hereby certify that the foregoing printed pages contain a full, true and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal and the bond on appeal and the order made by this Court extending the time for filing the record in this cause in the Circuit Court of Appeals for the Sixth Circuit, in accordance with the praecipe for transcript filed herein, the originals of which remain in my custody as Clerk of said Court.

There is also attached to and transmitted herewith the original citation issued and allowed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said Court, at Cleveland, in said District, this 1st day of June, A. D. 1926, and in the 150th year of the Independence of the United States of America.

B. C. MILLER, *Clerk,*

(Seal)

By F. J. DENZLER,
Deputy Clerk.

SUPPLEMENTAL TRANSCRIPT OF RECORD

(Filed June 11, 1928)

No. .....

United States Circuit Court of Appeals

SIXTH CIRCUIT.

A. B. LEACH & COMPANY, INC.,
Appellant,

vs.

HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY,
Appellee.

No. 1606. EQUITY.

APPEAL FROM UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

SUPPLEMENT TO TRANSCRIPT OF RECORD.

NEWMAN, POPPENHUSEN, STERN & JOHNSTON,
11 So. La Salle Street, Chicago, Ill.,
DAY & DAY,
Engineers Bank Bldg., Cleveland, Ohio,
Attorneys for Appellant.

WILSON, HAHN & WILSON,
Terminal Bldg., Youngstown, Ohio, and
A. M. HENDERSON,
City Bank Bldg., Youngstown, Ohio,
Attorneys for Appellee.

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United States Circuit Court of Appeals

SIXTH CIRCUIT.

No. 1606.

A. B. LEACH AND COMPANY, INC., *Appellant,*

vs.

HUGH W. GRANT, Receiver of THE STRUTHERS FURNACE COMPANY, *Appellee.*

IN EQUITY.

STIPULATION OF COUNSEL RELATIVE TO NEW MATTER TO BE INCLUDED IN THE RECORD.

Now come the parties hereto, by their respective counsel, in conformity with a suggestion heretofore made by this Court, and hereby stipulate and agree that certified copies of the pleadings and application filed with, and orders made by the Court of Common Pleas of Mahoning County, Ohio, in causes numbered 56102 and 56103, respectively, on the docket of said Court in cases entitled, respectively, Louis S. Baldwin, plaintiff, vs. The Struthers Furnace Company and The Guardian Savings and Trust Company, Trustee, defendants, and The Guardian Savings and Trust Company, Trustee, plaintiff, vs. The Struthers Furnace Company, defendant, be filed with this Court for its consideration in the determination of this cause, and that copies of this stipulation and said pleadings, application and orders be printed and filed with this Court as supplementary to the Transcript of Record hereinbefore filed:

The petition in the Baldwin case;

The petition in The Guardian Savings and Trust Company case;

The Journal Entry made by the Court on January 20, 1925, in the Baldwin case;

The Journal Entry made by the Court on January 22, 1925, in The Guardian Savings and Trust Company case;

The application made by the Receiver, filed July 30, 1925, in The Guardian Savings and Trust Company case;

The Journal Entry made by the Court on said application dated July 30, 1925, in The Guardian Savings and Trust Company case.

It is further stipulated and agreed by said parties, by their respective counsel, that no notice of the order authorizing and directing Hugh W. Grant as Receiver, to commence an action against A. B. Leach and Company, Inc. was given to any one by counsel for said Receiver.

NEWMAN, POPPENHUSEN, STERN & JOHNSTON,
DAY & DAY,

Counsel for Appellant, A. B. Leach & Company, Inc.

A. M. HENDERSON,
JAMES P. WILSON OF
WILSON, HAHN & WILSON,

Counsel for Appellee, Hugh W. Grant, Receiver of The Struthers Furnace Company.

IN THE COURT OF COMMON PLEAS.

STATE OF OHIO,
MAHONING COUNTY, SS.

THE GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE,
Cleveland, Ohio,
Plaintiff,

vs.

THE STRUTHERS FURNACE COMPANY,
Struthers, Ohio,
Defendant.

No. .....

PETITION.

FIRST CAUSE OF ACTION.

Now comes The Guardian Savings and Trust Company and for its first cause of action says that it and the defendant are corporations duly organized and existing under the laws of the State of Ohio.

Plaintiff further says that on or about May 1, 1922, the defendant in accordance with resolutions duly adopted by its Board of Directors and stockholders at respective meetings thereof duly called and held, authorized an issue of bonds to be executed under its corporate seal by its duly authorized officers in an amount not exceeding in the aggregate the principal sum of $1,500,000 at any one time outstanding; said bonds to be either coupon or registered and bearing date May 1st, 1922, by the terms of which bonds the defendant promised to pay to the bearer thereof or in case of registered bonds, to the registered holder thereof, the face amount of said bonds, all of said bonds to be due on May 1st, 1942, and to be payable in gold coin of the United States of America of the then standard of weight and fineness, and to bear interest at the rate of 8% per annum from the date thereof until paid, interest payable semi-annually on the 1st days of May and November in each year in like gold coin, such interest to be evidenced by coupons attached to the bonds for successive installments thereof.

That on or about May 18, 1922, the defendant being thereunto duly authorized by the action of its Board of

Directors and of its stockholders at respective meetings thereof duly called and held, duly made, executed and delivered to the plaintiff as Trustee, its First Mortgage Trust Deed (hereinafter referred to as the "Mortgage") dated as of May 1st, 1922, wherein and whereby, in order to secure the payment of the principal and interest of all such bonds at any time outstanding and to secure the performance and observance of all the covenants and conditions in such Mortgage contained, the defendant granted, bargained and conveyed unto the plaintiff as Trustee, its successors and assigns forever, certain properties hereinafter described.

After the execution and delivery of said Mortgage the defendant duly made and executed bonds of the aggregate face value of $1,500,000 of said issue, all of which bonds were duly certified by the plaintiff as Trustee, as provided in said Mortgage, and all of said bonds were duly issued by the defendant for a valuable consideration and in accordance with the provisions of said Mortgage; that all of said bonds are now outstanding in the hands of various persons and corporations who are now the owners and holders thereof, for value, and said bonds are in all respects valid and outstanding obligations of the defendant.

That the plaintiff duly accepted the trusts created by the Mortgage and was and now is fully authorized and empowered to execute all trusts and privileges created and reposed in it under and by virtue of the provisions thereof.

That by said Mortgage it is provided in Article V thereof:

Section 2. "In case one or more of the following events, herein termed 'events of default,' shall happen, that is to say,

"(a) default shall be made in the payment of any installment of interest on any of the bonds as the same shall become payable, as therein and herein expressed and such default shall continue for thirty days:

then, the Trustee may in its discretion, and upon request in writing by the holders of one-fourth in amount of the bonds then outstanding, shall declare the principal of all the bonds, if not already due, to be forthwith due and payable and upon such declaration the same shall become due and payable immediately.

Section 17. "In case—

"(1) Default shall be made in the payment of any installment of interest on any bond or bonds at any time outstanding, and such default shall continue for a period of thirty days;

then, upon demand of the Trustee, the Company will pay to the Trustee, for the benefit of the holders of the bonds and coupons then outstanding, the whole amount that then shall have become due and payable on all such bonds and coupons then outstanding, for interest or principal, or both, as the case may be, with interest at the rate of Eight Per Cent (8%) per annum upon the overdue principal and installments of interest; and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including a reasonable compensation to the Trustee, its agents, attorneys and counsel and any expenses or liabilities incurred by the Trustee hereunder; and in case the Company shall fail to pay the same forthwith upon such demand, the Trustee, in its own name and as Trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid."

That the defendant defaulted in the payment of the semi-annual installment of interest due on all the said bonds November 1st, 1924, and such default has continued for a period of more than thirty days; that the plaintiff as Trustee has, pursuant to the terms of said Mortgage, declared the principal of all the bonds outstanding due and payable and has demanded that the Company pay to it as Trustee for the benefit of the holders of the bonds and coupons now outstanding, the entire principal amount of all said bonds, the interest now due and payable on said bonds with interest at 8% per annum upon the overdue installment of interest and principal.

SECOND CAUSE OF ACTION.

For its second cause of action plaintiff adopts all and singular the averments and allegations contained in the foregoing first cause of action as fully as if rewritten herein.

Plaintiff further says that by the Mortgage duly made, executed and delivered by the defendant to the plaintiff as Trustee to secure the payment of the princi-

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pal and interest of all of the said bonds at any time outstanding and to secure the performance and observance of all the covenants and conditions in said mortgage contained, the defendant granted, bargained, sold, released, conveyed, assigned, transferred, mortgaged, pledged, set over, warranted and confirmed unto the plaintiff as Trustee and its successors in the trust created by said mortgage all and singular the following described property:

All the following described real estate situated in the City of Struthers, County of Mahoning and State of Ohio:

Being known as part of Out Lot No. 21 and all of Out-Lot No. 23 according to the latest enumeration of lots in said City, and bounded and described as follows:

First Parcel: Beginning at a stone set at the intersection of the North Westerly line of Bridge Street with the North Easterly line of Union Street; running thence North 48° 35′ West, along the North Easterly line of Union Street, a distance of 733.2 feet to a stone; thence North 79° 31′ West, a distance of 457.3 feet to a stone; thence South 41° 25′ West, a distance of 425 feet to a stone set on the North Easterly line of lands now owned or occupied by The Pennsylvania Railroad Company; thence North 48° 35′ West, a distance of 132.9 feet to an iron pipe filled with concrete; thence North 2° 17′ East a distance of 10.3 feet to an iron pin set in concrete; thence North 48° 35′ West a distance of 819.5 feet to an iron pin; thence South 60° 30′ East a distance of 152 feet to an iron pin; thence North 26° 46½ West a distance of 159.68 feet; thence North 48° 14½ West, a distance of 96.6 feet to a point on the Southerly line of lands now owned or occupied by The Lake Erie and Eastern Railroad Company; thence in an Easterly direction along the Southerly line of said lands now owned or occupied by The Lake Erie and Eastern Railroad Company, a distance of about 2514 feet to a point in the center of the Mahoning River; thence along the center of the Mahoning River, in a general south Easterly direction to a point in the North-Westerly line of Bridge Street, if said Street were extended on its present course into said River, thence South 41° 25′ West along said Extension of the North Westerly line of Bridge Street and along the North Westerly line of Bridge Street, a distance of 855.6 feet to the place of beginning.

Second Parcel: Being a triangular shaped parcel of land lying at the Southerly end of the Bridge crossing the Mahoning River and bounded North Easterly by the Mahoning River; Southerly by the right of way occupied by The P. & L. E. Railroad Company's switch from its main line to The Struthers Furnace Company, and North-Westerly by the South Easterly line of Bridge Street, and containing ½ acre of land and water, be the same more or less, and now known as a part of Out-Lot No. 23 in the City of Struthers.

Third Parcel: Also all rights and privileges which The Struthers Furnace Company have or may have in or to the right of way upon which is constructed switching Railroad track connecting the above described lands and running through a part of the same, with the Pittsburgh & Lake Erie Railroad Company's main line.

All of the above described parcels containing 32.306 acres of land, be the same more or less.

WADE MINE LEASES.

All the right, title and interest which the Company has or may hereafter acquire in the following described property, whether under and by virtue of a certain indenture of Lease from North Star Iron Company of West Virginia as Lessor to The Cleveland Cliffs Iron Company, as lessee, dated February 1, 1918, an undivided one-half interest in which lease was thereafter assigned by The Cleveland Cliffs Iron Company to the Struthers Furnace Company by assignment dated October 31, 1918, to otherwise, and more particularly described as follows, to-wit:

Situated in the County of St. Louis and State of Minnesota, and described as the North half of the Southeast quarter (N. ½ of S.E. ¼), the North half of the Southwest quarter (N. ½ of S.W. ¼) and the Southeast quarter of the Southwest quarter (S.E. ¼ of S.W. ¼) of Section twelve (12), also the North half of the Northwest quarter (N. ½ of N. W. ¼) and the Southeast quarter of the Northwest quarter (S.E. ¼ of the N.W. ¼) of Section Thirteen (13) all being in Township Fifty eight (58) north, Range Nineteen (19) west.

Also all right, title and interest which the Company now has or may hereafter acquire in and to a certain Operating Agreement executed by and between North Star Iron Company of West Virginia and The Cleve-

land Cliffs Iron Company, dated February 1, 1918, covering the operation of the premises demised by the aforesaid lease dated February 1, 1918, between the same parties, an undivided one half interest in which Operating Agreement was assigned by The Cleveland Cliffs Iron Company, to The Struthers Furnace Company by assignment dated October 31, 1918.

And with all the privileges, appurtenances, easements and rights thereunto belonging, subject, however, at all times to all the rights of said North Star Iron Company of West Virginia under said Operating Agreement.

HELMER MINE LEASES.

All the right, title and interest which the Company has or may hereafter acquire in the following described property, whether under and by virtue of State Mineral Contract No. 402, executed by the State of Minnesota to Robert Whiteside on November 28, 1900, for the purposes therein stated, which contract was thereafter assigned by Arthur C. Swallow, Administrator, *et al.*, to The Cleveland Cliffs Iron Company, by assignment dated January 2, 1918, and an undivided one half interest in which contract was thereafter assigned by The Cleveland Cliffs Iron Company to The Struthers Furnace Company, by assignment dated October 31, 1918 or otherwise, and more particularly described as follows, to-wit:—

Situated in the County of St. Louis and State of Minnesota and described as:—

The Northeast quarter of the Northeast quarter (N.E. ¼ of N.E. ¼) of Section Fourteen (14) in Township Fifty Eight (58) North, Range Nineteen (19) West.

Subject, however, to the covenants and conditions contained in the following:

Agreement by and between William A. Kerr, *et al.* and E. H. Jennings, *et al.*, dated December 12, 1906, filed in the office of the State Auditor of the State of Minnesota, and recorded in the office of the Register of Deeds of St. Louis County, Minnesota, in Book 6 of Agreements, Page 20. Sub-lease by and between the Jennings Mines Company *et al.* and George C. Swallow *et al.*, dated July 13, 1909, filed in the office of the State Auditor of Minnesota, and recorded in the office of the Register of Deeds of St. Louis County, Minnesota, in Book 10, of Agreements, Page 122, which sub-lease was

modified by an agreement by and between the aforesaid parties dated July 23, 1913, and recorded in the office of the Register of Deeds of St. Louis County, Minnesota, in Book 17 of Agreements, Page 27.

Also all the right, title and interest which the Company now has or may hereafter acquire in the following described premises, whether under and by virtue of a certain sublease entered into by and between the Jennings Mines Company *et al.* and George C. Swallow dated July 13, 1909, filed in the office of the State Auditor of the State of Minnesota and recorded in the office of the Register of Deeds of St. Louis County, Minnesota, in Book 10 of Agreements, Page 122, and a modification of said sub-lease entered into by and between the aforesaid parties dated July 23, 1913, recorded in the office of the Register of Deeds of St. Louis County, Minnesota, in Book 17 of Agreements, page 27, which sub-lease and modification thereof were assigned by Arthur C. Swallow, Administrator, *et al.* To the Cleveland Cliffs Iron Company by assignment dated January 2, 1918, and an undivided one half interest in which sub lease and modification thereof was assigned by The Cleveland Cliffs Iron Company to The Struthers Furnace Company by assignment dated October 31, 1918, or otherwise, and more particularly described as follows, to-wit:

Situated in the County of St. Louis and State of Minnesota and described as the West half of the Northeast quarter (W. ½ of N.E. ¼) and the Northwest quarter of the Southeast quarter (N.W. ¼ of S.E. ¼) of Section Fourteen (14), Township Fifty Eight (58) North, Range Nineteen (19) west.

Also all the right, title and interest which the company now has or may hereafter acquire in the following described premises, whether under and by virtue of a certain License Agreement entered into by and between Oliver Iron Mining Company and George C. Swallow *et al.*, dated December 7, 1916, which License Agreement was thereafter assigned by Arthur C. Swallow, Administrator *et al.*, to The Cleveland Cliffs Iron Company by assignment dated January 2, 1918, and an undivided one half interest in which License Agreement was assigned by The Cleveland Cliffs Iron Company to the Struthers Furnace Company by assignment dated October 31, 1918, by and renewal or extension thereof, or otherwise, and more particularly described as follows, to-wit:

Situated in the County of St. Louis and State of Minnesota, and described as the Southeast quarter of the Northeast quarter (S. E. ¼ of N. E. ¼) of Section Fourteen (14) in Township Fifty eight (58) North, Range Nineteen (19) West.

This transfer, by way of Mortgage of the right, title and interest of the Struthers Furnace Company in and to said License Agreement or any renewal or extension thereof shall not be operative or effective as an assignment of the Company's interest therein until Oliver Iron Mining Company and the other owners referred to in said License Agreement of December 7, 1916, shall consent to this transfer by way of Mortgage.

And with all the privileges, appurtenances, easements and rights thereto belonging.

All other lands, interests in lands, easements, leases of lands and any and every right with respect thereto, whatsoever and wheresoever the same may be situated, which the Company now owns or has or ever shall hereafter acquire and the present and future appurtenances thereof; together with any and all fixed assets of any and every nature now owned or hereafter acquired by the Company, including all the roads, railroads, railway tracks, industrial tracks, side tracks and sidings, switches, trestles, streets, ways, passages, waters, water courses, riparian and other rights, privileges, hereditaments and appurtenances whatsoever, and the reversions and remainders; and all plants, buildings, offices, structures, improvements, houses, shops, forges, blast furnaces, pig casting machinery, mills, machine shops, repair shops, laboratories, engine houses, locomotive cranes, steam shovels, car equipment, 126 Steel hopper cars, all marked "Hopper T. S. F. X.," numbered as follows: 1000 to 1045, both numbers inclusive, of 100,000 pounds capacity each, 2001 to 2060, both numbers inclusive, of 110,000 pounds capacity each, 3000 to 3019 both numbers inclusive, of 140,000 pounds capacity each, (including railroad, transfer, larry, slag, hot metal, charging, skip and scale cars), ore unloaders, elevators, drums, cranes, skull cracker cranes, engines, boilers, pumping machinery, piping and fittings, machines and fixtures, electric lighting systems, electric power circuits electric generators and motors, electric appliances, switchboards, transformers, ladles, crane buckets, conveyors, shafting, belting, pulleys, couplings, tools, imple-

ments and fixtures, furniture, safes, drawings, prints, patterns, models, licenses, records, surveys, documents and maps; all repair parts belonging to any of the aforementioned equipment or parts kept or acquired as spares or duplicates and all other apparatus, appliances, tools, implements, equipment and accessories which may now or at any time hereafter be used for or in connection with the business of the company upon the above described premises or which may now or at any time hereafter be located thereon; and all the estate, right, title, interest, possession, claim and demand of every nature and kind whatsoever, at law or in equity, of the Company, in and to any of the things aforesaid now or hereafter arising.

And all corporate or other rights, privileges and franchises which the Company now has or which hereafter the Company shall acquire, possess or become entitled to.

And any and all property of every name and nature, from time to time hereafter by delivery or writing of any kind for the purposes hereof conveyed, mortgaged, pledged, transferred or assigned by the Company, or by anyone in its behalf, to the Trustee, which is hereby authorized to receive any property at any and all times, as and for additional security, and also, when and as hereafter provided, as substitute security for the payment of the Bonds and to hold and apply all such property subject to the terms hereof.

There is not included hereunder any corporate stocks owned by the Company nor any mined ore, coal, coke, supplies, manufactured iron, cash accounts, bills receivable or current assets, all being expressly excluded herefrom.

That in said mortgage it is provided in Article V thereof:

Section 2. "In case one or more of the following events, herein termed 'events of default,' shall happen, that is to say,

"(a) Default shall be made in the payment of any installment of interest on any of the bonds as the same shall become payable, as therein and herein expressed, and such default shall continue for thirty days.

Section 4. "In case of the happening of an event of default specified in Section 2 of this Article and its

continuance for the period, if any, specified in said Section then and in each and every such case, such default subsisting, the Trustee,

"(b) May proceed to protect and enforce its rights and the rights of bondholders under this Mortgage by suit in equity or action at law, whether for the specific performance of any covenant or agreement contained herein or in aid of the execution of any power herein granted or for any foreclosure hereunder or for the enforcement of any proper legal or equitable remedy as the Trustee, being advised by counsel, shall deem most effectual to protect and enforce the rights aforesaid.

Section 5. "In case upon the happening and continuance of any of the events of default aforesaid, the Trustee shall proceed by a suit in equity or action at law, the Trustee shall be entitled, pending any such suit or action, as a matter of right, to the appointment of a receiver of the trust estate, and of the tolls, earnings, revenues, rents, issues, profits and incomes thereof.

Section 6. "The Company, for itself, its successors and assigns, covenants and agrees with the Trustee, that if by reason of the happening and continuance of any event of default aforesaid the Trustee commences or institutes any suit or action or other legal proceedings to obtain possession of the trust estate, it will, and its successors and assigns shall, waiving the issue and service of process, thereupon enter a voluntary appearance in such suit or action or proceeding and consent to the entry of a judgment for the recovery and possession of the trust estate and of the tolls, earnings, revenues, rents, issues, profits and income thereof; and that upon the commencement by the Trustee of any suit or action or other legal proceedings in compliance with the provisions hereof for the foreclosure of this Mortgage, it will, and its successors and assigns shall, waiving the issue and service of process, enter a voluntary appearance in such suit or action or proceeding and consent to the appointment of a receiver or receivers of the trust estate and the tolls, earnings, revenues, rents, issues, profits and income thereof for the benefit of the holders of the bonds.

Section 8. "In the event of any sale, whether made under the power of sale hereby granted and conferred or under or by virtue of judicial proceedings, the whole of

the property subject to the lien hereof shall be sold in one parcel and as an entirety, unless the holders of a majority in amount of the bonds then outstanding shall in writing request the Trustee to cause such property to be sold in parcels, in which case the sales shall be made in such parcels as shall be specified in such request, or unless such sale as an entirety is impracticable by reason of some statute or otherwise.

"The Company, for itself and all persons and corporations hereafter claiming through or under it or who may at any time hereafter become holders of liens junior to the lien of this Mortgage, hereby expressly waives and releases all right to have the properties and estate comprised in the security intended to be created by this Mortgage marshalled upon any foreclosure or other enforcement hereof, and the Trustee, or any court in which the foreclosure of this Mortgage or administration of the trusts hereby created is sought, shall have the right as aforesaid to sell the entire property of every description comprised in or subject to the trusts created by this Mortgage as a whole in single parcel.

Section 16. "Upon any such sale, any purchaser, for the purpose of making settlement or payment for the property purchased, shal be entitled to use and apply any bonds and any matured and unpaid coupons thereto appertaining, after such bonds and coupons have been presented to the Trustee for crediting thereon the sums applicable to the payment thereof out of the net proceeds of such sale to the holder of such bonds and coupons as his ratable share of such net proceeds after the deduction of costs, expenses, compensation and other charges; such purchasers shall be credited on account of the purchase price of the property purchased with said sums so payable out of said net proceeds on the bonds and coupons so presented and at any such sale any bondholder or any other person may appear and purchase such property and may make payment therefor, as aforesaid, and upon compliance with the terms of sale may hold, retain and dispose of such property without further accountability therefor."

That said Mortgage was duly recorded in the office of the Recorder of Mahoning County, Ohio, May 20, 1922 as a real estate mortgage, Instrument, Serial Number 3358, Chattel Mortgage Instrument Serial Number 62461, and was duly recorded in the Office of Registrar of Deeds

of St. Louis County, Minnesota, June 13, 1922 in Book 458 of Mortgages, page 83, and was duly filed in the office of Registrar of Titles, St. Louis County, Minnesota, June 22, 1922 as Document No. 53010.

That the defendant has broken the conditions of the said Mortgage by defaulting in the payment of the semi-annual installment of interest due on all of the said bonds November 1st, 1924, such default having continued for a period of more than thirty days.

WHEREFORE the plaintiff as Trustee under said Mortgage prays;

1. That it be given judgment for $1,560.00, being the principal amount of said bonds plus the semi-annual installment of interest thereupon due on November 1st, 1924, together with interest at the rate of 8% per annum upon the said overdue principal and installment of interest and such reasonable compensation to this plaintiff as Trustee its agents and attorneys as may be determined by the court.

2. That said Mortgage be declared a valid first lien upon all and singular the real and personal property therein and herein described, including all renewals and replacements of the same or of any part thereof, and of the appurtenances thereunto belonging.

3. That the property described in the said Mortgage and herein, be sold under orders of this Court in one parcel and that the proceeds of said sale be brought to this Court to be distributed by it and that payments be made out of the proceeds of such sale in the following order:

1. Costs and expenses of such sale.

2. The expenses of and reasonable compensation to the plaintiff as Trustee, its agents and attorneys.

3. The amount due on the outstanding bonds for principal and interest, with interest at the rate of 8% per annum upon the said overdue principal and interest, and further that if this plaintiff or any of the holders of the said bonds bid upon such property at such sale they be allowed as a credit in part payment of any such bid the amount which they would otherwise receive from the proceeds of such sale upon such bonds and the coupons attached, upon presenting such bonds and coupons to be credited thereupon the proportionate amounts which would otherwise accrue to such bonds and coupons from

the proceeds of such sale, all as provided in said Mortgage.

4. In case of the insufficiency of the proceeds of such sale to pay the full amount of the principal and interest so due and unpaid upon said bonds secured by said mortgage with interest upon the overdue interest and reasonable compensation to the plaintiff as Trustee, its agents and attorneys, that such insufficiency be declared a valid claim against the defendant.

5. That a receiver be forthwith appointed to take charge of the property of the defendant to manage, control and conduct the same and collect the rents, earnings, issues, profits and incomes therefrom.

6. That the court order the defendant or any receiver appointed to take charge of the defendant's property to hold, set apart and sequester any and all amounts received as rents, earnings, issues, profits or incomes by the defendant or any said receiver, from or upon any of the property described herein, for the payment of the amount due upon said bonds for principal and interest, with interest upon the overdue interest and reasonable compensation to the plaintiff as trustee, its agents and attorneys.

For such other and further relief in the premises as may be just and equitable.

TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for the Plaintiff.

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

L. B. Foote, being first duly sworn, deposes and says that he is Vice President of the Guardian Savings and Trust Company, the above named plaintiff, duly authorized herein, that he has read the foregoing petition and that the allegations and averments contained therein are true as he verily believes.

L. B. FOOTE.

Sworn to before me and subscribed in my presence this 14th day of January 1925.

J. W. REAVIS,
Notary Public.

(Seal)

COURT OF COMMON PLEAS.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

I, N. H. CHANEY, Clerk of the Court of Common Pleas of said County do hereby certify that the foregoing is a true and correct copy of the PETITION in the case of THE GUARDIAN SAVINGS & TRUST CO. vs. THE STRUTHERS FURNACE COMPANY now on file in my office.

WITNESS my hand and the seal of the said Court this 14th day of February, A. D. 1925.

N. H. CHANEY, *Clerk.*

By ETHEL M. BRICKMAN (Signed)
Deputy.

No. 56103.
COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO.

THE GUARDIAN SAVINGS & TRUST COMPANY,
Cleveland, Ohio,
Plaintiff,

VS.

THE STRUTHERS FURNACE COMPANY,
Struthers, Ohio,
Defendant.

PETITION.

CLERK'S OFFICE, MAHONING COUNTY, OHIO.
FILED JAN. 15, 1925.
N. H. CHANEY, *Clerk.*

TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Plaintiff.

IN THE COURT OF COMMON PLEAS.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

THE GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE,
Plaintiff,

vs.

THE STRUTHERS FURNACE COMPANY,
Defendant.

JAN. TERM, 1925.
TO-WIT: JAN. 22, 1925.
JOURNAL VOL. 144 A
PAGE 108.

CERTIFIED COPY OF JOURNAL ENTRY.

This cause came on to be heard upon the petition of plaintiff herein and the prayer contained in said petition that a receiver be forthwith appointed to take charge of the property of the defendant The Struthers Furnace Company, to manage, control and conduct the same and collect the rents, earnings, issues, profits and incomes therefrom, and it appearing to the Court that there is now pending in this Court a cause recorded on the records of this Court as the cause of Louis S. Baldwin, plaintiff, versus The Struthers Furnace Company and The Guardian Savings & Trust Company, Trustee, No. 56102 in which latter cause prayer is also made by plaintiff for the appointment of a receiver to take charge of the plant, property and assets of the said The Struthers Furnace Company; and it further appearing to the Court that it will be for the best interests of all the parties to this action and the action of Louis S. Baldwin versus The Struthers Furnace Company and The Guardian Savings & Trust Company, Trustee so to do, the Court, upon its own motion and for the purpose of the appointment of a receiver to do the things for which prayers are made in the petitions filed in these cases hereby consolidates the case of Louis S. Baldwin versus The Struthers Furnace Company and The Guardian Savings & Trust Company Trustee, No. 56102 with this case insofar as the questions of the appointment and acts and duties of a receiver are common to both the last mentioned case and the case now being considered by this Court.

Coming now to the consideration of the prayers of the petition in this cause and the cause consolidated herewith as aforesaid, the Court finds that there is urgent exigency existing calling for the immediate appointment of a receiver in these cases to preserve the property and assets of the said The Struthers Furnace Company.

Whereupon the Court hereby grants the prayers of the petitions for a receiver in both these cases and hereby appoints Hugh W. Grant of Youngstown, Ohio, receiver in both said cases, and directs and empowers said receiver to take possession of all the property, real and personal, designated in the petition in the said cause of Louis S. Baldwin versus The Struthers Furnace Company and The Guardian Savings & Trust Company, Trustee, No. 56102, together with all other property, both real and personal, of said company, including its books and papers; and it is hereby ordered, adjudged and decreed that the said receiver, after the giving of bond as hereinafter provided, shall be, and he is hereby, authorized and directed to do all things necessary to be done by him in order to properly preserve and protect the assets and property of the company in his control for the best interests of all parties interested therein and to manage, control and conduct the same and collect the rents, earnings, issues, profits and incomes therefrom.

It is hereby ordered, adjudged and decreed that the said Hugh W. Grant, before entering into his duties as receiver aforesaid, shall give bond in the sum of Fifty Thousand Dollars ($50,000.00) to the approval of the Court.

It is further ordered, adjudged and decreed that all pleadings, proceedings and entries in or of this Court made or filed with reference to the action or conduct of said Receiver shall be made, filed, had and recorded in the case of The Guardian Savings & Trust Company, Trustee, versus The Struthers Furnace Company, and the said pleadings, proceedings and entries so made, filed, had and recorded shall also apply to and be made a part of the case of Louis S. Baldwin versus The Struthers Furnace Company and The Guardian Savings & Trust Company, Trustee No. 56102, with the same force and legal effect as though also made, filed, had and recorded in the said case of Louis S. Baldwin versus

The Struthers Furnace Company and The Guardian Savings & Trust Company Trustee. The costs of cause No. 56102 to follow in cause No. 56103.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

I, Ford H. Canfield, Clerk of the Court of Common Pleas within and for said County, and in whose custody the Files, Journals and Records of said Court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the Journal of the proceedings of said Court within and for said County, and that said foregoing copy has been compared by me with the original entry on said Journal, and that the same is a correct transcript thereof.

IN TESTIMONY WHEREOF, I do hereto subscribe my name officially and affix the Seal of said Court, at the Court House in Youngstown, in said County, this 7th day of Dec., A. D. 1925.

FORD H. CANFIELD, *Clerk.*
MARJORIE THORNTON, *Deputy Clerk.*

No. 56103.

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COURT OF COMMON PLEAS.

MAHONING COUNTY, OHIO.

CERTIFIED COPY OF JOURNAL ENTRY.

THE GUARDIAN SAVINGS & TRUST COMPANY TRUSTEE,
Plaintiff,

against

THE STRUTHERS FURNACE CO.,
Defendant.

IN THE COURT OF COMMON PLEAS.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

LOUIS S. BALDWIN, Struthers, Ohio,
Plaintiff,

vs.

THE STRUTHERS FURNACE COMPANY, and
THE GUARDIAN SAVINGS & TRUST COMPANY, Trustee,
Defendants.

No. .....

PETITION.

Plaintiff says that he is a citizen of the State of Ohio and that he is a resident of the City of Struthers, County of Mahoning and said State of Ohio; that he is a preferred stockholder of The Struthers Furnace Company, which is a corporation duly and legally created, organized and existing under and by virtue of the laws of the State of Ohio, and that said The Struthers Furnace Company, is a citizen of the State of Ohio; that plaintiff is the owner of preferred stock of said Company of the par value of Three Thousand, Five Hundred Dollars ($3,500.00); that said Company is the owner of a plant and property in the said City of Struthers, Mahoning County, Ohio, for the manufacture, production and sale of foundry and basic pig iron, situated on a part of Out-lot Number Twenty-one (21) and Out-lot Number Twenty-three (23) according to the latest enumeration of lots in said City of Struthers, comprising Thirty-two and three hundred six thousandths (32.306) acres of land, more or less; that it is also the owner of an undivided one-half (½) interest in what is known as the "Wade Mine Leases," being leases of iron ore on property situated in the County of St. Louis and State of Minnesota; that it is also the owner of an undivided one-half interest in the "Helmer Mine Leases," situated also in the County of St. Louis and State of Minnesota, and other contracts and agreements relating to said leases for iron ore.

Plaintiff further says that the defendant, The Struthers Furnace Company, successfully operated its plant and manufactured pig iron and marketed its product at a fair price for many years prior to about May

1st, 1924; that it then had on hand and was unable to sell at a profit upwards of Eighty Thousand (80,000) tons of pig iron; that the price had been so reduced on account of the mills in the Mahoning and Shenango district constructing furnaces, operating the same and manufacturing pig iron to supply their own needs, and more, and by reason of selling their surplus pig iron in competition with the product of merchant furnaces in the market and manufacturing such iron for their own use, both limited the customers and markets of such merchant furnaces and so broke the same that said defendant company was unable to dispose of its stock on hand, both manufactured and to be manufactured, except at a great loss, if at all, and on or about May 1st, 1924, said Company was therefore compelled to close down its plant and cease operations and has not been able to sell its product and to operate, for want of capital ever since; that as a further result of said conditions the price of its product was materially reduced and if said Company is to continue in business upon a competitive basis, it must meet, or substantially meet, said reduction in prices so made by its competitors, or failing so to do, be unable, as heretofore, to sell its manufactured product; that as a result of the conditions and situation hereinbefore set forth, the operation of said plant was discontinued and could not be continued, except at a great loss.

Plaintiff further says that said Company is indebted, on bonds secured by first mortgage trust deed to the defendant, The Guardian Savings & Trust Company, a duly organized and existing banking and trust Company, as Trustee, under the laws of the State of Ohio, in the sum of One Million, Five Hundred Thousand Dollars ($1,500,000.00); that it has been unable to pay off the semi-annual interest due on said bonds November 1st, 1924, in the sum of Sixty Thousand Dollars ($60,000.00), and has no funds with which to pay the same and the accruing interest; that said Company is further indebted on past due notes, accounts and other current obligations in sum of Two Million, Seventy-two Thousand, Seven Hundred Ten and 14/100 Dollars ($2,072,710.14).

Plaintiff further says that said Company is in urgent need of additional working capital with which to finance the operation of its business, but that in view of the general financial conditions heretofore and now ex-

isting, and especially in view of the conditions at the present time prevailing in the merchant furnace manufacturing industry and narrowed market for its product, it is unable at the present time to finance its additional capital requirements, either by the sale of bonds, notes, stocks or otherwise; that said plant cannot be put in operation under present conditions by the Company; that in view of the fact that it is unable to meet its outstanding obligations, contractual and otherwise, it is and will be subjected to the commencement of suits against it, the recovery of judgments against it, the issuance of executions against its plant, property and assets and the sale of such plant, property and assets, unless such judgments are paid and discharged; that in order to secure its outstanding notes and obligations to Banks, in the sum of One Million, Seven Hundred Twelve Thousand, Seven Hundred Thirteen & 03/100 Dollars ($1,712,713.03) it transferred Warehouse Certificates, covering about Eighty Thousand (80,000) tons of pig iron and Thirty-three Thousand, Five Hundred (33,500) tons of iron ore as collateral security; that one of the holders of said notes and obligations has already sold Twenty-two thousand, Five Hundred Sixty-five (22,565) tons of pig iron and Twenty-six Thousand (26,000) tons of iron ore and bought in the same for its own account and has wrongfully failed and refused to account for said Company's equity therein, which plaintiff is informed and believes and therefore avers would amount to One Hundred Thousand Dollars ($100,000.00) or more, at the present market price.

Plaintiff further says that under prevailing conditions the plant, property and assets of said Company could not be sold except at a great loss and that, as hereinbefore set forth, said Company is unable at the present time in any way or manner to finance its past, present and maturing obligations.

Wherefore, and by reason of the facts hereinbefore set forth, plaintiff says that for the protection of the bondholders, stockholders and creditors of said Company alike it is necessary that a Receiver be appointed to take charge of and conserve the plant, property and assets of said Company until such time when the financial requirements of said Company may be provided and the reorganization of said Company, if necessary, accomplished.

Wherefore, plaintiff prays that this Honorable Court will, by order, duly entered, appoint a Receiver to take charge of the plant, property and assets of said The Struthers Furnace Company, and for each other and further relief as in equity it may be entitled and as the nature of the case may require.

HARRINGTON, DEFORD, HUXLEY & SMITH,
Attorneys for Plaintiff.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

Louis S. Baldwin, being first duly sworn, says that he is the plaintiff in the foregoing action and that the facts stated and allegations made in the foregoing Petition are true as he verily believes.

LOUIS S. BALDWIN.

Sworn to before me and subscribed in my presence this 15th day of January, A. D. 1925.

FORD H. CANFIELD
Notary Public.

(Seal)

IN THE COURT OF COMMON PLEAS.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

LOUIS S. BALDWIN,
Plaintiff,

VS.

THE STRUTHERS FURNACE COMPANY, and
THE GUARDIAN SAVINGS & TRUST COMPANY,
Defendants.

PRECIPE.

To the Clerk:

Issue summons in the above entitled action, directed to the Sheriff of Mahoning County, Ohio, for the defendant, The Struthers Furnace Company, and to the Sheriff of Cuyahoga County, Ohio, for the defendant, The Guardian Savings & Trust Company, returnable according to law. Endorse same, "Action for equitable relief and the appointment of a Receiver."

HARRINGTON, DEFORD, HUXLEY & SMITH,
Attorneys for Plaintiff.

COURT OF COMMON PLEAS.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

I, FORD H. CANFIELD, Clerk of the Court of Common Pleas of said County, do hereby certify that the foregoing is a true and correct copy of the PETITION AND PRECIPE in the case of LOUIS S. BALDWIN vs. THE STRUTHERS FURNACE COMPANY ET AL., now on file in my office.

WITNESS my hand and the Seal of the said Court this 22nd day of April, A. D. 1927.

FORD H. CANFIELD, *Clerk.*

(Seal) By MARJORIE THORNTON, *Deputy.*

No. 56102.

COURT OF COMMON PLEAS,

MAHONING COUNTY, OHIO.

LOUIS S. BALDWIN,

Plaintiff,

vs.

THE STRUTHERS FURNACE COMPANY *et al.,*

Defendants.

PETITION AND PRECIPE.

CLERK'S OFFICE, MAHONING COUNTY, OHIO.

FILED JAN. 15, 1925.

N. H. CHANEY, *Clerk.*

HARRINGTON, DEFORD, HUXLEY & SMITH, *Attorneys,*
Youngstown, Ohio.

IN THE COURT OF COMMON PLEAS.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

LOUIS S. BALDWIN, *Plaintiff,*
against
THE STRUTHERS FURNACE COMPANY *et al.,* *Defendants.*

JAN. Term, 1925
to-wit: January 20, 1925.
Journal Vol. 144a
Page 88.

CERTIFIED COPY OF JOURNAL ENTRY.

This cause coming on to be heard upon the petition of plaintiff and the prayer therein contained that this Court, by order, appoint a receiver to take charge of the plant, property and assets of The Struthers Furnace Company, and it appearing to the Court that there is now pending in this Court an action in which The Guardian Savings & Trust Company, Trustee, is plaintiff and The Struthers Furnace Company is defendant and numbered as case No. 56103 of this Court in the petition in which case prayer is also made by The Guardian Savings & Trust Company trustee, that a receiver be appointed to take charge of the property of The Struthers Furnace Company and to manage, control and conduct the same and collect the rents, earnings, issues, profits and incomes therefrom; and it appearing to the Court that The Struthers Furnace Company is the owner of the several parcels of real estate, leases and personal property described in the petition filed in the case of The Guardian Savings & Trust Company, Trustee, versus The Struthers Furnace Company; and it further appearing to the Court that it will be for the best interests of all the parties to this action and the action of The Guardian Savings and Trust Company, Trustee, versus The Struthers Furnace Company, so to do, the Court, upon its own motion and for the purpose of the appointment of a receiver to do the things for which prayers are made in the petitions filed in these cases, hereby consolidates the case of The Guardian Savings & Trust Company, Trustee, versus The Struthers Furnace Company No. 56103, with this case insofar as the questions of the appointment and acts and duties of a receiver are common to both the last mentioned case and the case now being considered by this Court.

Coming now to the consideration of the prayers of the petition in this cause and the cause consolidated herewith as aforesaid, the Court finds that there is urgent exigency existing calling for the immediate appointment of a receiver in these cases to preserve the property and assets of the said The Struthers Furnace Company.

Whereupon the Court hereby grants the prayers of the petitions for a receiver in both these cases and hereby appoints Hugh W. Grant of Youngstown, Ohio, receiver in both said cases, and directs and empowers said receiver to take possession of all the property, real and personal, designated in the petition in the said cause of The Guardian Savings & Trust Company, Trustee, versus The Struthers Furnace Company No. 56103, together with all other property, both real and personal, of said company, including its books and papers; and it is hereby ordered, adjudged and decreed that the said receiver, after the giving of bond as hereinafter provided shall be, and he is hereby, authorized and directed to do all things necessary to be done by him in order to properly preserve and protect the assets and property of the company in his control for the best interests of all parties interested therein and to manage, control and conduct the same and collect the rents, earnings, issues, profits and incomes therefrom.

It is further ordered that the officers, agents and employees of said, The Struthers Furnace Company, immediately upon demand of said Receiver, turn over to said Receiver all property of said Company including money, all books, notes, papers, records, chattels, evidences of debts and assets of every kind and description.

It is hereby ordered, adjudged and decreed that the said Hugh W. Grant, before entering into his duties as receiver aforesaid, shall give bond in the sum of Fifty Thousand Dollars ($50,000.00) to the approval of the Court.

It is further ordered, adjudged and decreed that all pleadings, proceedings and entries in or of this Court filed with reference to the acts or conduct of said receiver shall be filed, had and recorded in the case of The Guardian Savings & Trust Company, Trustees, versus The Struthers Furnace Company, No. 56103, and with the same force and legal effect as though filed, had and recorded in both the causes to which reference is herein made.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

I, Ford H. Canfield, Clerk of the Court of Common Pleas within and for said County, and in whose custody the Files, Journals and Records of said Court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the Journal of the Proceedings of said Court within and for said County, and that said foregoing copy has been compared by me with the original entry on said Journal, and that the same is a correct transcript thereof.

IN TESTIMONY WHEREOF, I do hereto subscribe my name officially and affix the Seal of said Court, at the Court House in Youngstown, in said County, this 7th day of Dec. A. D. 1925.

FORD H. CANFIELD, *Clerk.*

(Seal) MARJORIE THORNTON, *Deputy Clerk.*

No. 56102.

Journal Vol. 144A Page 88

COURT OF COMMON PLEAS,

MAHONING COUNTY, OHIO.

CERTIFIED COPY OF JOURNAL ENTRY.

LOUIS S. BALDWIN,

Plaintiff,

against

THE STRUTHERS FURNACE COM. *et al.,*

Defendants.

IN THE COURT OF COMMON PLEAS.

MAHONING COUNTY, OHIO.

THE GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE,
Plaintiff,
vs.
THE STRUTHERS FURNACE COMPANY,
Defendant.

No. .....

APPLICATION OF RECEIVER TO BRING SUIT AGAINST A. B. LEACH & COMPANY, INC.

Now comes Hugh W. Grant, the duly appointed Receiver in the above entitled cause, and moves the Court for an order granting to him, as such Receiver, authority to bring suit against A. B. Leach & Company Inc. with offices in New York, Chicago and Cleveland, in the District Court of the United States Northern District of Ohio, Eastern Division, and for ground therefor says:

That the said A. B. Leach & Company, Inc., on or about the 15th day of May 1922, was the owner of three thousand (3000) shares of the preferred stock of The Struthers Furnace Company and that on or about said date it entered into an ultra vires, illegal, unlawful, unjust and unreasonable contract with The Struthers Furnace Company by the terms of which contract the said A. B. Leach & Company sold, transferred and traded to The Struthers Furnace Company the said three thousand shares of preferred stock and received from The Struthers Furnace Company first mortgage bonds upon the real estate and property of the said company in payment of said preferred stock.

This Receiver represents to the Court that he believes that he should recover for the benefit of the stockholders and creditors of the company the fair market value of the bonds thus delivered to the said A. B. Leach and Company, Inc. or the bonds themselves, and that it would be to the material benefit of the creditors and stockholders of the company if leave to commence said action were granted by this Court.

A. M. HENDERSON,
One of the Attorneys for the Receiver.

COURT OF COMMON PLEAS.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

I, Ford H. Canfield, Clerk of the Court of Common Pleas of said County do hereby certify that the foregoing is a true and correct copy of the APPLICATION OF RECEIVER TO BRING SUIT AGAINST A. B. LEACH & COMPANY INCORPORATED in the case of The Guardian Savings & Trust Co. vs. The Struthers Furnace Co. now on file in my office.

WITNESS my hand and the Seal of the said Court this 13th day of Dec. A. D. 1926.

(Seal)

FORD H. CANFIELD, *Clerk.*
By ALMA WARNER, *Deputy.*

No. 56103.

COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO.

THE GUARDIAN SAVINGS & TRUST CO., TRUSTEE,
Plaintiff,

VS.

THE STRUTHERS FURNACE CO.,
Defendant.

APPLICATION OF RECEIVER TO BRING SUIT AGAINST A. B. LEACH & COMPANY, INCORPORATED.

CLERK'S OFFICE,
Mahoning County, Ohio.
Filed July 30, 1925.
FORD H. CANFIELD, *Clerk.*
WILSON, HAHN, HENDERSON & WILSON, *Attys.*
Terminal Bldg.

CERTIFIED COPY OF JOURNAL ENTRY.

COURT OF COMMON PLEAS.

MAHONING COUNTY, OHIO.

THE GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE, *Plaintiff,*

vs.

THE STRUTHERS FURNACE COMPANY, *Defendant.*

MAY TERM, A. D. 1925.
TO-WIT:
JULY 30, 1925.
No. 56103.
JOURNAL VOL. 145A
PAGE 539.

CERTIFIED COPY OF JOURNAL ENTRY.

This cause came on to be heard upon the application of the Receiver for leave to sue A. B. Leach & Company, Incorporated, in the District Court of the United States, Northern District of Ohio, Eastern Division, as more fully set out in the Application filed herein, and it appearing to the Court that it is for the best interests of the creditors and stockholders of the company that such action be commenced:—

It is hereby ordered, adjudged and decreed that the said Hugh W. Grant, Receiver in this action, be, and he is hereby, authorized and directed to so commence the action aforesaid against A. B. Leach & Company, Incorporated, in said Court, praying for such relief as should be obtained against said company, either for money judgment or otherwise, in order to reimburse the said Receiver for the apparent unlawful and illegal issuance of bonds by said company to A. B. Leach & Company on or about May 15, 1922 in payment for which said A. B. Leach & Company sold, assigned, transferred and set over to said company three thousand shares of the preferred stock of said The Struthers Furnace Company theretofore purchased and then owned by said A. B. Leach & Company, Incorporated.

COURT OF COMMON PLEAS.

THE STATE OF OHIO,
MAHONING COUNTY, SS.

I, Ford H. Canfield, Clerk of the Court of Common Pleas, within and for said County, and in whose custody the Files, Journals and Record of said Court are required by the Laws of the State of Ohio to be kept, do hereby certify that the foregoing is taken and copied from the Journal of the proceedings of said Court, that the foregoing has been compared by me with the original entry on said Journal, and that the same is a true and correct copy thereof.

IN TESTIMONY WHEREOF, I hereunto subscribe my name officially, and affix the seal of said Court at the Court House in Youngstown, in said County, this 8th day of Feb. 1926.

FORD H. CANFIELD,

(Seal) *Clerk of said Court of Common Pleas.*

By MARJORIE THORNTON, *Deputy.*

No. 56103.

Doc. Page.

COMMON PLEAS COURT
MAHONING COUNTY, OHIO.

THE GUARDIAN SAVINGS & TRUST COMPANY, TRUSTEE,
Plaintiff,

vs.

THE STRUTHERS FURNACE COMPANY,
Defendant.

CERTIFIED COPY OF JOURNAL ENTRY.

Journal Vol. 145A Page 539.

The suggestion referred to in the stipulation hereinbefore contained came from the United States Circuit Court of Appeals in the form of a letter, an exact copy of which letter being as follows:

"Cincinnati, Ohio,
May 24th, 1928.

Newman, Poppenhusen, Stern & Johnston,
Roanoke Building,
Chicago, Ill.

Day & Day,
Engineers Bank Bldg.,
Cleveland, Ohio,

Wilson, Hahn & Wilson,
Terminal Building,
Youngstown, Ohio,

Mr. A. M. Henderson,
City Bank Building,
Youngstown, Ohio.

Gentlemen:

In connection with the case of A. B. Leach & Company, Inc. vs. Hugh W. Grant, Receiver of the Struthers Furnace Company, No. 4663, I am directed to say that it appears to the court that a decision as to the authority of the receiver to maintain this suit, if such decision were based merely upon the absence from the present record of the proceedings of the Common Pleas Court bearing upon such authority, would not be effective as a final decision upon that point,—since the Court would be much inclined to remand the record so that either party might correct this omission in the proofs, if such omission there had been. It is therefore suggested to counsel that they consider whether the rights of the parties may be properly preserved under a stipulation that there now be filed in this court certified copies of any order or orders made in the Common Pleas Court appointing the receiver, and any petition or petitions upon which such orders were based, and of the order, if any, purporting to authorize the receiver to bring this suit, and of the petition, if any, filed and the notice, if any, given supporting such order. If such a stipulation is made and such copies are filed, the court will hear

oral arguments, half an hour on each side, on June 13th next, and will consider any printed briefs which may then be filed.

The further argument desired will be devoted to the question whether authority to bring this suit either was or could be conferred upon the receiver, and be rightly based upon the pleadings, in connection with the controlling statutes and equitable principles, and whether such authority would or would not be rightly incidental to and consistent with the nature and purposes of his possession of those assets which passed to the receiver.

If, in the judgment of counsel, this stipulated addition to the record should make necessary taking further proofs, which it may be claimed would have been taken if the record had been thus completed at the trial, the court will consider also the right to take such further proofs.

Yours very truly,

(Signed) ARTHUR B. MUSSMAN,
ARTHUR B. MUSSMAN, *Clerk.*"

ABM-NL

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

(Filed June 4, 1926)

ARTHUR B. MUSSMAN,
Clerk of said Court:

Please enter my appearance as Counsel for the Appellant.

NEWMAN, POPPENHUSEN, STERN & JOHNSTON,
Chicago, Ill.

DAY & DAY, *Cleveland, Ohio.*

CAUSE ARGUED AND SUBMITTED

(January 5, 1927—Before DENISON, MOORMAN and HICKENLOOPER, JJ.)

This cause is argued by Mr. Edward R. Johnston for the Appellant and by Mr. Andrew M. Henderson and Mr. James P. Wilson for the Appellee and is submitted to the Court.

CAUSE RE-ARGUED AND SUBMITTED

(June 13, 1928—Before DENISON, MOORMAN *and* HICKENLOOPER, JJ.)

This cause is re-argued by Mr. Edward R. Johnston for the Appellant and by Mr. James P. Wilson and Mr. Andrew M. Henderson for the Appellee and is submitted to the Court.

DECREE

(Filed June 30, 1928)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed with costs and the cause remanded to the said District Court with direction to dismiss the bill.

OPINION

(Filed July 11, 1928)

Before DENISON and MOORMAN, Circuit Judges, and HICKENLOOPER, District Judge.

MOORMAN, Circuit Judge: The appellant, A. B. Leach & Company, purchased an issue of bonds, of the par value of a million, five hundred thousand dollars, from the Struthers Furnace Company on May 15, 1922, for which the Struthers Company accepted in part payment three thousand shares of its own preferred stock at the agreed price of $85.00 a share. In January of 1925 Hugh Grant was appointed receiver for the Struthers Company by the common pleas court of Mahoning County, Ohio, and in August of 1925 he brought this suit to recover from Leach & Company the bonds which it received in exchange for the three thousand shares of stock, asking the alternative relief of an accounting if the bonds had been sold or disposed of and could not be recovered.

The bill averred that plaintiff was the duly appointed and qualified receiver "of all the property, goods, assets,

choses in action, and of all other kind and character of property of the Struthers Furnace Company," and that the action was brought "by virtue of authority granted him [the plaintiff] by the court so appointing him receiver." In its answer appellant admitted the appointment of Leach as receiver, but alleged that it had no knowledge or information as to his authority to bring the action. Upon the latter question no issue was made in the evidence. We preferred not to decide it upon a construction of the pleadings, and hence we suggested to counsel that they file certified copies of any orders or proceedings had in the common pleas court, where the receiver was appointed, and stipulate that this court might consider such orders or proceedings in determining the question on its merits. This suggestion has been acted upon and certified copies of all pertinent pleadings and orders have been filed.

There were two suits filed in the Mahoning County Court: One by Baldwin, a preferred stockholder, seeking the appointment of a receiver; and the other by the Guardian Savings & Trust Company, trustee under the mortgage, to foreclose the mortgage, and asking in aid thereof the appointment of a receiver. The same receiver was appointed in each case and the two causes were consolidated. The sole relief sought in the Baldwin case was the appointment of a receiver. This was asked on the ground that the company did not have funds to pay its due obligations, and that unless a receiver was appointed it would be subjected to suits and judgments, and to sacrificial sales of its plant and assets. No claim was asserted against any one in the bill, and there was no averment of waste, mismanagement, or any wrongful act on the part of the corporation or directors, or that any of plaintiff's rights as a stockholder had been impaired or injured by any act of the company or its officers. The other suit was a foreclosure suit to sell the mortgaged property and apply the proceeds thereof to the mortgage debt.

It is well settled that the appointment of a receiver can be made only in aid of some primary object of a pending suit, and that an action for the appointment of a receiver cannot be maintained where no cause of action or ground for equitable relief is otherwise stated. *Gillespie* v. *Illi-*

would be without remedy as, in that case, any injured precedent creditor or preferred stockholder could maintain an action for restitution. Whether such creditor or stockholder would be permitted to intervene for that purpose in the foreclosure suit, and assert so hostile a claim to the objects of that suit, may well be doubted. *Commonwealth Trust Co.* v. *Power Co.* (N. H.), 89 Atl. 452. That question, however, we do not have to decide, since for our purposes it is enough to say that a court cannot confer on a receiver appointed in a foreclosure proceeding the power to do something not in aid of the purposes of the suit.

In arriving at the conclusion just stated we have had no occasion to consider whether the order appointing the receiver can be attacked in this case. The question is not whether that order is valid but whether the receiver had authority, as he alleged, to bring this suit. Nor do we overlook *Sayle, Receiver,* v. *Guarantee Savings & Loan Co.,* 2 O. C. C. R. (N. S.) 401, affirmed without opinion in 72 O. S. 639. That case is to be considered, we think, in the light of the further rule in Ohio that a court has no authority to appoint a receiver, and therefore no power to confer, except in aid of the objects of a pending cause. When so considered the decision in the circuit court and its affirmance without opinion in the supreme court can not be regarded as establishing a settled construction by the highest court of the state. The affirmance by the supreme court may have been upon some other ground than that on which the action of the circuit court was based.

It is said, however, that the action of the common pleas court was within the powers which it possessed to marshal liens on the mortgaged property, and to determine rights of lien claimants among themselves. That power, it may be admitted, exists in a proper action where one lien claimant is asserting a right or preference against another, or is seeking to have the claim of another adjudged invalid; but in our opinion it does not exist in the court *sua sponte* in a foreclosure suit where there is but one lien or mortgage, admitted to be valid in the pleadings, and where none of the claimants there-

under nor any other interested party is contesting the claim of any one else. The trustee did not claim that any of the bonds were fraudulently issued to appellant, or that any of them were invalid or did not constitute a lien in the hands of Leach & Company or its assignee on the mortgaged property. No bondholder, creditor or stockholder has asserted any such claim, and none of them may ever do so; and yet the court, whose jurisdiction was invoked solely to foreclose the mortgage, went beyond that purpose and directed its receiver to institute a suit in another jurisdiction to cancel certain of the mortgage bonds or to recover, in behalf of creditors and stockholders (presumably the mortgaged property would satisfy in full the mortgage debt) a judgment against the holders of such bonds. It might be argued that the order was invalid because of the rule forbidding a receiver not vested with the title to the receivership property to bring such a suit in a foreign jurisdiction. *Manufacturing Company* v. *Harris,* 198 U. S. 561; *Stewett* v. *Bank of Cincinnati,* 248 U. S. 73. But we do not go into that question, as we think it was beyond the power of the court, as otherwise limited, to make such authorization.

It follows that the decree must be vacated and the bill dismissed.

Hickenlooper, District Judge, dissents.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, ARTHUR B. MUSSMAN, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *A. B. Leach & Company* v. *Hugh Grant, Receiver, etc.*, No. 4663, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 6th day of August, A. D. 1928.

ARTHUR B. MUSSMAN,
[SEAL] Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 29, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
SEP 28 1928
CHARLES E. WILEY, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 479

HUGH W. GRANT, Receiver of the Struthers Furnace Company, Petitioner,

vs.

A. B. LEACH & COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. P. WILSON,
Counsel for Petitioner.
A. M. HENDERSON,
Of Counsel for Petitioner.

(33,788)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 479

HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY, PETITIONER,

vs.

A. B. LEACH & COMPANY, INC.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Hugh W. Grant, Receiver of The Struthers Furnace Company, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

On May 15, 1922, A. B. Leach & Company, Inc., purchased an issue of 8 per cent first mortgage bonds of the face or par value of $1,500,000 of The Struthers

Furnace Company, of Struthers, Ohio, an Ohio corporation, at an agreed price of 90½ cents on the dollar and accrued interest, in part payment of which Leach & Company delivered, and the Furnace Company accepted 3,000 shares of the 7 per cent preferred stock of the Furnace Company at a fixed price of $85 per share of the par value of $100 each. It has been the claim of your petitioner at all times during this controversy that this exchange of preferred stock for first mortgage bonds was consummated under such circumstances as to constitute fraud and was in violation of the corporation laws of the State of Ohio, and the articles of incorporation of the Furnace Company.

In January of 1925, Hugh W. Grant, of Youngstown, Ohio, was appointed Receiver of the Furnace Company by the Common Pleas Court of Mahoning County, Ohio, and in August of 1925, as such Receiver, he brought suit in the District Court of the United States for the Northern District of Ohio, seeking to recover and require Leach & Company to return the bonds which it had received in this fraudulent and illegal exchange for the 3,000 shares of preferred stock, to wit, bonds of the face value of $255,000, plus interest paid upon them and asking the alternative relief of an accounting if the bonds had been sold or otherwise placed beyond the control of Leach & Company.

The bill of the Receiver Grant averred that he was (R., 2)

> "The duly appointed and qualified Receiver of all of the property, goods, assets, choses in action and of all other kind and character of property of The Struthers Furnace Company,

duly appointed by the Court of Common Pleas of Mahoning County in the case of The Guardian Savings & Trust Company, Trustee, Cleveland, Ohio, *versus* The Struthers Furnace Company, being case No. 56103 in the said Court, and that he was appointed and duly qualified on the 20th day of January, 1925."

In its answer respondent admitted these allegations of the bill as above quoted (R., 9 and R., 19).

Your petitioner further averred in his bill that the action was brought by the Receiver "by virtue of authority so to do granted to him by the court so appointing him as Receiver" (R., 2), and as to this averment the respondent *neither admitted nor denied the allegation, but required your petitioner to make strict proof thereof* (R., 9 and R., 19).

Two suits had been commenced in the Court of Common Pleas of Mahoning County, Ohio, on January 25, 1925, one by Louis S. Baldwin, a preferred stockholder, and the other by The Guardian Savings & Trust Company, trustee under the mortgage securing the bonds, a portion of which had been exchanged by the Furnace Company for the 3,000 shares of the preferred stock then owned by Leach & Company, in both of which suits the appointment of a receiver was asked. The two cases were consolidated by the State court and your petitioner was appointed by the court in both of them (R., 251 to 253). In the Baldwin case, various allegations of facts tending to show insolvency of the Furnace Company were made (R., 255-256), as well as an allegation to the effect that certain creditors of the Furnace Company had failed to make

an accounting to the company for its equity in certain personal property which had been pledged to those creditors and wrongfully disposed of by them (R., 256) and prayed for the appointment of a receiver to "take charge of the plant, property, and assets" of the Furnace Company, and for such other equitable relief as to which plaintiff may be entitled (R., 257). The other of these two suits was brought by The Guardian Savings & Trust Company, trustee, in foreclosure of the mortgage securing these bonds and seeking in aid thereof the appointment of a receiver, and other equitable relief.

Subsequent to the appointment of the Receiver, to wit, on July 30, 1925, the State court *did* issue to the Receiver in these consolidated cases an order of authority to sue Leach & Company for the recovery of equitable relief for the benefit of the creditors and stockholders of the Furnace Company on account of the above fraudulent and illegal exchange of the Furnace Company 8 per cent mortgage bonds for its 7 per cent preferred stock (R., 262 to 264). Upon this authority so granted by the State court, this action was so commenced in the said Federal Court of Ohio upon the ground that this exchange of bonds for preferred stock was contrary to law, fraudulent and in violation of the terms and provisions of the articles of incorporation of the Furnace Company; that the purchasers of the bonds who had paid cash to the Company therefor, and the preferred stockholders who had given their required written consent to the bond issue, upon the representation of the officers and directors of

the company that it would receive *cash* for *all* the bonds, were entitled, in the name of the Receiver, to an accounting, *i. e.*, either to a return of the bonds and interest for the 3,000 shares of preferred stock tendered back by the Receiver, or cash; that the exchange was a fraudulent preference among the preferred stockholders of the Furnace Company, the total outstanding preferred stock, held at the time by many owners, being 12,500 shares (R., 2 to 8).

There was very little dispute as to the facts in the case; the respondent herein answering upon the merits of the case by denying any fraud in the exchange and setting up estoppel of the Furnace Company and the Receiver, entirety of contract for the total issue of the bonds and that to compel the return of a part of the bonds would be making for it a new contract, and that the parties could not, in equity, be restored to their former position if the relief for which the Receiver prayed were granted.

The District Court entered a final decree for your petitioner, holding that the Receiver possessed "all the powers conferred by statute and general principles of equity on a Receiver" (R., 202), and rendering judgment against Leach & Company in the sum of $312,375, but granting to Leach & Company the equitable favor of being permitted to apply any part or all of the $255,000, face value of bonds, to the payment of this judgment (R., 213). The District Court held that under the corporation laws of the State of Ohio, as well as the general principles of equity, this exchange of mortgage bonds for preferred stock was unlawful and

beyond the powers of the Furnace Company and violated "numerous principles of corporation law and most of the principles of justice and honesty" (R., 210), as well as constituting a "gross form of fraud and unfair dealing" (R., 210).

The United States Circuit Court of Appeals for the Sixth Circuit, to which court the judgment of the District Court was appealed, reversed the judgment of the lower court and ordered the cause remanded to the District Court with a mandate to the lower court to dismiss your petitioner's bill, upon the ground that, while the State court had authority to appoint a receiver in the foreclosure suit of the trustee of the bonds against the Furnace Company, it did not have the power to direct him to take charge of any property not covered by the mortgage, and that, since there was no object or purpose in the suit of the preferred stockholder Baldwin against the Furnace Company that could be served by the bringing of the case at bar, "the State court was without authority to direct the Receiver to bring it" (R., 270-274).

The Appellate Court further held that it had no occasion to consider whether the order appointing the Receiver could be attacked in this case, the question being, *not whether the order was valid, but whether the Receiver had authority, as alleged, to bring this suit,* and that it was beyond the power of the State court to make the authorization for the Receiver to do so (R., 274 to 275).

A summary of these matters thus involved herein leads us to the following specifications, to wit:

First. On January 15, 1925, the trustee, designated under the mortgage deed of trust of the Furnace Company, brought suit in the State court praying for foreclosure of the mortgage deed, judgment for any deficiency, and the appointment of a receiver of all the company's property, segregation of the funds realized from this property, etc. (R., 248,249).

Second. On the same day, a preferred stockholder of the Furnace Company brought suit in the same State court alleging insolvency of the company, its failure to obtain an accounting from its creditors and debtors, and praying for the appointment of a receiver to take charge, possession, and control of all the property of the company, real and personal (R., 254 to 257).

Third. These cases were both filed in a State court having jurisdiction of the parties and the subject-matter.

Fourth. The two cases were consolidated by the State court and your petitioner was appointed as Receiver of all the property, both real and personal, of the Furnace Company in this consolidated action (R., 251 to 253).

Fifth. It is admitted by the pleadings in the case at bar that your petitioner was, at the time of the commencement of this action, the "duly appointed and qualified Receiver of all of the property, goods, assets, choses in action, and of all other kind and character of property of The Struthers Furnace Company, duly appointed by the Common Pleas Court of Ma-

honing County in the case of The Guardian Savings & Trust Company, trustee, Cleveland, Ohio, against The Struthers Furnace Company" (R., 9 and 19).

SIXTH. Upon application of the Receiver (R., 266) an order of the State court which had appointed your petitioner as such Receiver "of all of the property, goods, assets, choses in action, and of all other kind and character of property of The Struthers Furnace Company" was duly made to bring this suit in the Federal court for the benefit of the stockholders and creditors of the company (R., 264).

SEVENTH. By virtue of such authority, the Receiver sought to maintain this suit in the District Court for an accounting by Leach & Company, Inc., for the bonds which it had obtained unlawfully and fraudulently or for the purchase price thereof which it had agreed to pay but had not lawfully or equitably paid in fairness and justice to the preferred stockholders (other than Leach & Company, Inc.), and the purchasers of the bonds *for cash* (R., 2 to 8).

EIGHTH. Your petitioner recovered a judgment in said lower court finding that exchange of bonds of The Struthers Furnace Company for the preferred stock of said company was beyond the power of the corporation and its directors to accomplish and void, and that it constituted an unlawful transfer of the corporation assets and accomplished a fraud to the detriment of the bondholders, stockholders, and creditors of the corporation; and the defendant, Leach and Company, is liable and obligated in equity to account to the

plaintiff for the face value of the first mortgage gold bonds so unlawfully exchanged to the extent of the value placed upon said preferred stock in the exchange, that is two hundred fifty-five thousand ($255,000) dollars, with interest. Judgment was rendered for three hundred twelve thousand three hundred seventy-five ($312,375) dollars. The decree provided, however, that Leach and Company might surrender to the trustee for cancellation, any of the said mortgage bonds which it could control, in lieu of the payment of that much money on the judgment (R., 214 to 216).

NINTH. The United States Circuit Court of Appeals for the Sixth Circuit, by a divided court (Judge Hickenlooper, D. J., dissenting) held, that under these circumstances the Receiver did not have authority to maintain this action, reversed the judgment of the District Court upon this ground alone (R., 270 to 275), and remanded the case to the lower court with a mandate directing that court to dismiss your petitioner's bill (R., 270).

B.

Reasons Relied On for the Allowance of Writ.

In rendering the above decision, the United States Circuit Court of Appeals for the Sixth Circuit has:

FIRST. So far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision;

SECOND. Decided an important question of local law in a way in conflict with applicable local decisions;

THIRD. Decided an important question of general law in a way untenable or in conflict with the weight of authority;

FOURTH. Rendered a decision in conflict with the decisions of other United States circuit courts of appeals on the same matter.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of an under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 1606, Equity, A. B. Leach & Company, Inc., appellant, *versus* Hugh W. Grant, Receiver of The Struthers Furnace Company, appellee, and that the said decree and judgment of the said United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HUGH W. GRANT,
Receiver of the Struthers Furnace Company,
By J. P. WILSON,
Counsel for Petitioner, and
A. M. HENDERSON,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 479

HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY, PETITIONER,

vs.

A. B. LEACH & COMPANY, INC.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion in the United States District Court for the Northern District of Ohio (Eastern Division) was rendered on the 3d day of March, 1926, by the Hon. D. C. Westenhaver, district judge, and is found (R., 202-213).

The opinion in the United States Circuit Court of Appeals for the Sixth Circuit was filed on the 11th

day of July, 1928, and is found (R., 270-275); reported in vol. 27 (2d)—No. 2, Fed. Rep., adv. sheets, Sept. 13, '28, 201.

II.

Jurisdiction.

1. The date of the judgment to be reversed is June 30, 1928 (R., 270).

2. The claims advanced by petitioner herein were that the petitioner, as Receiver of The Struthers Furnace Company, has a right to maintain this action by virtue of his appointment as such Receiver by the Court of Common Pleas of Mahoning County, Ohio (R., 251-253 and 259-261), and also by virtue of the order of the said State court to bring the suit (R., 264-265). The appointment of the Receiver and the order of authority to bring this suit were made by the State court in two causes then pending in the State court, one for foreclosure of a mortgage deed of trust (R., 237-249) and one brought by a preferred stockholder, against The Struthers Furnace Company, the latter suit praying for equitable relief, and petitions in both cases praying for the appointment of a receiver.

The United States Circuit Court of Appeals for the Sixth Circuit, held that the Receiver did not have authority to commence and maintain the action at bar and that it was beyond the power of the State court to make the authorization to bring this acion (R., 270-275).

3. The statutory provisions under which the jurisdiction of the Supreme Court of the United States is invoked in this case is Judicial Code, Sec. 240 (*a*), as amended by the Act of February 13, 1925, 43 Stats., 938, and the reasons for granting petition for writ of certiorari are provided in Rule 35, Sec. 5 of this Court.

4. The case of

P. & R. C. & I. v. Gilbert, 245 U. S., 162; 62 Law. Ed., 221,

is to the effect that it is within the sound discretion of this Court to grant this petition for a writ of certiorari.

III.

Statement of the Case.

A full statement of the case has been given under heading "A" in the petition, and, therefore, in the interest of brevity, such statement is not to be repeated at this point.

IV.

Specification of Errors.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in finding and holding that petitioner herein did not have authority to commence and maintain this action in the United States District Court for the Northern District of Ohio against respondent.

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in finding and holding that it was beyond the power of the Common Pleas Court of Mahoning County to make the authorization upon which petitioner, as Receiver of The Struthers Furnace Company, commenced and is now seeking to maintain this suit.

V.

ARGUMENT.

Summary of the Argument.

POINT A. The United States Circuit Court of Appeals for the Sixth Circuit, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in that—

First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit, and,

Second, it held that the authority of the State court to authorize the Receiver to sue Leach & Company could be questioned and attacked in this case.

POINT B. The United States Circuit Court of Appeals for the Sixth Circuit decided an important question of local law in a way in conflict with the applicable local decision, in that—

First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit, and,

Second, it held that the authority of the State court to authorize the Receiver to sue Leach & Company could be questioned and attacked in this case.

POINT C. The United States Circuit Court of Appeals for the Sixth Circuit decided an important question of general law in a way untenable or in conflict with the weight of authority.

POINT D. The United States Circuit Court of Appeals for the Sixth Circuit rendered a decision in conflict with the decision of other United States circuit courts of appeals on the same matter, in that—

First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit and,

Second, it held that the authority of the State court to sue Leach & Company could be questioned and attacked in this case.

POINT A.

The United States Circuit Court of Appeals for the Sixth Circuit, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in that—First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit.

We are departing from the order by which Rule 35, Section 5 of this Court points out the reasons upon

which the court may, in its discretion, grant your petitioner's prayer for a writ of certiorari so as to urge the above reason as the first, rather than the last, of those suggested by the rule.

We do this with the idea in mind that under this point heading a more general and comprehensive argument may be made upon the reasons set forth herein for the granting of this petition, and in a more logical sequence, than under any other point heading made in this brief.

The original foreclosure proceeding was brought by the trustee of the bondholders, as much the trustee for Leach & Company as of any other bondholders. The mortgage itself provided that a receiver might be appointed upon prayer of the trustee (R., 246) for the purpose of conserving the rights of all of the bondholders, and the trustee having invoked the powers of a court of equity to conserve its rights and properly distribute the proceeds of the mortgaged property, to say the least, it would seem grossly insufficient and anomalous, not to say ridiculous, for Leach & Company, standing in the shoes of a bondholder whose money it had received for the sale of the bonds, to come into court now and question the authority of the Receiver to preserve the assets of all other bondholders and to inquire into the validity of some of the bonds.

In addition to this, it must be borne in mind that the above foreclosure suit was consolidated with the suit of Louis S. Baldwin against the Furnace Company (R., 259), the petition in which latter suit (R., 254), as we have stated in our statement of matters

involved in the petition, clearly set up an insolvent condition of the Furnace Company, a failure of the officers and directors to protect the company from its creditors and the prayer for the appointment of a receiver to take charge of all the assets of the company, with the fair inference from the petition as a whole that it was sought to carry the affairs of the company in the hands of a receiver either to the point of a liquidation and dissolution or recapitalization. We believe that the allegations of the petition in the Baldwin suit were sufficient to warrant the State court, in the exercise of its discretion, to appoint a receiver for all of the property of the company; certainly, however, when the Baldwin case was consolidated with the trustee's foreclosure suit against the Furnace Company and when both petitions prayed for the same relief upon different allegations of fact upon which to base the granting of such relief, to wit, the appointment of a receiver, the court was fully justified under the laws of the State of Ohio, in appointing a receiver over all the property of the Furnace Company in answer to the prayers in both of these suits.

State of the Pleadings.

An examination of the petitions filed by the trustee in the foreclosure suit shows that in the prayer of the petition judgment for the entire amount due on the outstanding bonds was asked and that a sale of the mortgaged property be had (R., 248).

The prayer for a deficiency judgment in the event that the proceeds of the sale were not sufficient to liquidate the bonds was also made. Then the further prayer for the appointment of a receiver to take charge of the property and

> "that the court order the defendant *or any receiver appointed to take charge of the defendant's property* to hold, set apart and sequester any amounts received arising in any way from the *mortgaged* property" (R., 249).

In other words, the whole intent and purpose of this prayer is that a receiver be appointed to take charge of all the property of the Furnace Company; that any deficiency be declared a valid claim against the Furnace Company, and that the Receiver appointed to take charge of the defendant's property sequester and set apart any and all amounts received from the *mortgaged* property.

In other words, A. B. Leach & Company's own trustee prayed that the Receiver be vested with just exactly the extent of authority as that with which he was actually vested by the court in this case, and we believe that respondent should be precluded from challenging the act of its agent trustee.

Leach & Company, however, precluded itself from raising any question as to the validity of the State court's order by its answer filed in the instant case. The first paragraph of the Receiver's petition (R., 2) reads as follows:

> "Now comes the plaintiff, Hugh W. Grant, and avers that he is the *duly* appointed and qualified Receiver of *all of the property, goods, assets, choses in action and of all other kind and character of property of* The Struthers Furnace Company duly appointed by the Common Pleas Court of Mahoning County in the case of The Guardian Savings & Trust Company, Trustee, Cleveland, Ohio, *versus* Struthers Furnace Company, being case number 56103 in the said court and that he was appointed and *duly* qualified on the 20th day of January, 1925, and that he is a citizen and resident of the State of Ohio."

The answer and the amended answer of Leach & Company, found respectively on pages nine and nineteen of the record, say:

> "This defendant admits the allegations in the first paragraph of said petition contained."

Equity Rule Thirty provides:

> "Averments other than of value or amount of damage, if not denied, shall be deemed confessed."

Here we have a distinct admission of all the averments in the first paragraph of the petition. Thus the truth of these allegations is effectively and absolutely established.

What is the effect of the allegations of this first paragraph quoted *supra?* The averment is that the Receiver is the *duly* appointed and qualified Receiver of *all of the property, goods, assets, choses in action and*

of all other kind and character of property of the Furnace Company *duly* appointed by the Common Pleas Court of Mahoning County.

This admission is far reaching. Black's Law Dictionery defines the word "duly" as follows:

> "In due or proper form or manner; according to regular requirements; regularly; upon a proper foundation, as distinguished from mere form."

It then cites

Robertson v. Perkins, 129 U. S., 233.

In that case the court says:

> "The allegation of the complaint in this case is, that the plaintiff *duly made and filed protest in writing, and duly appealed to the Secretary of the Treasury.* • • • As none of these allegations were denied in the manner required by Section 500 of the Code, they were, by Section 522, to be taken as true; and no issue was joined upon any one of them."

quoting further

> "But the court held that the allegation that a corporation was 'duly organized under the laws of this State,' pursuant to the agreement, imported that the requisite number of persons united for that purpose; that it must be assumed that the corporation was regularly organized; and that it was unnecessary for the plaintiff to show in his complaint the precise steps taken to accomplish that result. The word *'duly'* means, in a proper way, or regularly, or *according to law.*"

Thus, under the authority of this Supreme Court decision, the effect of Leach & Company's admission of the averments of the first paragraph of the Receiver's petition was to admit that Grant was, according to legal requirements, and in due and proper form, appointed Receiver of *all* of the property of every kind and nature, including choses in action of the Furnace Company. This interpretation is also in exact conformity with the requirements of Equity Rule Thirty so that there could be no issue for the Circuit Court of Appeals to determine as to the regularity of either the appointment of Grant as Receiver or as to the court's right to vest in the Receiver the *entire* property and assets of every kind and nature belonging to the Furnace Company.

All of the second paragraph of the Receiver's petition was admitted except the allegation—

> "This action is brought by said Receiver by virtue of authority so to do granted to him by the Court of his appointment."

Now inasmuch as under the holding of *Robertson v. Perkins,* cited *supra,* and under the provision of Equity Rule Thirty it was not necessary for the Receiver to introduce any evidence as to his being duly appointed and qualified as Receiver of all the assets, at best, the only thing that could be required of the Receiver would be to introduce in evidence a certified copy of the journal entry of the State court appointing him (R., 264), authorizing him to bring this suit, *because all the legal requirements necessary to empower the court to*

give him this authority are admitted by the defendant when they specifically admit the allegations of the first paragraph.

The sole issue under the pleadings, therefore, was whether the court, who had admittedly and properly appointed the Receiver with custody of all the assets, *had actually granted* the authority to bring the suit. The introduction of the journal entry on this matter (R., 264) leaves the evidence uncontradicted that the court actually gave this authority, so there is no issue on that point.

But there could be no issue as to this question of whether or not the court actually gave this authority because the answer and the amended answer of Leach & Company state (R., 9 and 19) that the defendant

> "neither admits nor denies said allegations of the petition."

Such an answer does not conform with the requirements of Equity Rule Thirty so as to be construed as a denial of the allegation of authority, but is, we believe, equivalent to no answer at all and, therefore, amounts to an admission of this point also.

Even if it were to be conceded that the Circuit Court of Appeals had jurisdiction to pass on an issue as to whether or not the State court had authority to appoint the Receiver and as to whether or not the court authorized the Receiver to bring this suit (and we contend the Circuit Court did not have such jurisdiction), still, as we have shown, there was no issue for the court to determine as to either of these two matters.

The Authority of the Receiver Aside from the State of the Pleadings.

Aside from the state of the pleadings, however, we insist that the bringing of this case in the District Court was validly and properly authorized by the State Court under the laws of the State of Ohio and as a matter of law and of fact. Section 11894 of the General Code of Ohio, quoted below) enumerates the grounds upon which a receiver may be legally appointed in Ohio:

> "Sec. 11894. Appointment of Receiver.—A receiver may be appointed by the supreme court or a judge thereof, the court of appeals, or a judge thereof in his district, the common pleas court or a judge thereof in his district, or the probate court, in causes pending in such courts respectively, in the following cases:
>
> "1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed or materially injured;
>
> "2. In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condi-

tion of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

"3. After judgment, to carry the judgment into effect;

"4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

"5. In the cases provided in this title, and by special statutes when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

"6. In all other cases in which receivers heretofore have been appointed by the usages of equity."

Section 11897 (O. L. 51; V57) of the General Code of Ohio provides as follows:

"Powers of Receiver.—Under the control of the court, the receiver may bring and defend actions in his own name, as receiver, take and keep possession of the property, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes."

We confidently urge that the granting by the State court to the Receiver of the right to bring the suit at bar, *even though the order had been made in the foreclosure suit alone,* comes clearly within the provisions

of the above section of the Code of the State of Ohio. This section provides that "under the control of the court, the Receiver may bring and defend actions in his own name, as Receiver, * * * and generally do such acts *respecting the property* as the court authorizes." The commencement and maintenance of the petitioner's case against Leach & Company has been clearly one "respecting the property," with the possession of which, it is conceded in this case, the Receiver had been properly vested.

A receiver appointed under the laws of the State of Ohio has established to him by statutory provision, a legal right, and the effect of his appointment over the mortgaged property and his seizure of it, is to fasten the claims of creditors upon it and to give the receiver control over the property for the benefit of creditors. We contend, therefore, that the Receiver in this instance was required in the performance of his duty to protect the creditors of the company, as well as the stockholders thereof, against any fraudulent or invalid claim which might be made by way of lien or otherwise against the property of which he was so possessed. In the instant case, a lien on the property was being asserted, a very substantial part of which he had reason to believe was fraudulent and invalid. To protect the stockholders and these creditors whose claims had been so fastened upon the property itself, he brought this suit under the express order of the State Court (R., 264).

We cite to the court in this connection the case of *Cheney v. The Maumee Cycle Co.*, 64 O. S., 205,

a quotation from the opinion in which case to which we desire to particularly call this Court's attention being found on page 214 of the report and reading as follows:

> "By express provision of Sec. 5590 (now 11897 General Code), Revised Statutes, the receiver is given power, under the control of the court, to take and keep possession of the property, and generally to do such acts respecting the property as the court may authorize. This statutory provision establishes a legal right, and this legal right is not affected by the fact that it is conferred in an action in its nature equitable, nor by the fact that it is to be enforced against a claim which would have been good as between the claimant and the debtor. It follows from this that the effect of the appointment, and the seizure of the property by the receiver, was to fasten the claims of creditors upon it and to give that officer control over it for the benefit of creditors, and in this respect his relation to it was, for all practical purposes, the same as that which an assignee would have had. The property thus sequestered was held by the receiver as effectually as an assignee could have held it, or as creditors could have held it by attachment or levy. *In no other way than through him could the rights of creditors be worked out, and, in this aspect of the case, he represented the creditors rather than the debtor.*"

The Circuit Court of Appeals for the Sixth Circuit, however, in its opinion (R., 273), states:

> "Until some showing was made in the pleading or some relief asked touching upon the validity of the transaction with Leach & Company, the Court had no authority, we think, to inquire into that matter. This, of course, does not mean that those who suffered from fraud, if there was fraud, perpetrated upon the company in the issue and sale of the bonds, would be without remedy, as, in that case, any injured precedent creditor or preferred stockholder could maintain an action for restitution."

We cannot see the logic of this statement in view of the interpretation of the Ohio laws upon matters of receivership as put upon them by the Supreme Court of Ohio in the case of

Cheney v. Maumee Cycle Co., supra.

As above quoted, in connection with the holding of the lower court, that the Receiver in the instant case did not have authority to bring this action on behalf of the company's creditors (including the bondholders) and preferred stockholders, the Supreme Court of Ohio held that in cases of this kind the Receiver represented creditors rather than the debtors (in this case The Struthers Furnace Company), and, as we shall hereafter point out and as particularly held in the case of

Porter v. Sabin, 149 U. S., 473, 474; 37 Law Ed., 815,

the right of a creditor or stockholder to bring a suit of this kind is only available when the receiver of the

property concerning which the suit is brought or concerning any liens upon the property, has failed to bring such suit.

To say the least, it seems more than merely technical for the lower court to have reversed this case solely upon the theory that the Receiver could not have had authority to bring the suit on behalf of those whom he represented under the laws of the State of Ohio and whom the court below stated would have the right to bring such an action to recover upon a fraudulent transaction such as the one found by the District Court in the case at bar.

To the effect that a receiver in Ohio has the same powers with reference to the receivership property as though he were vested with actual title to all such property, real or personal, of the corporation of which he is so appointed, is the holding in the case of

> *W. D. Sayle, Rec'r, v. The Guarantee S. & L. Co.*, 2 O. C. C. R. (N. S.), 401, and affirmed by the Supreme Court of Ohio in 72 O. S., 639.

In

> *Smith on Receiverships*, Sec. 72,

this language is adopted:

> "Where a court of chancery in the order of appointment confers power on the receiver to sue, he may do so on the principle that the receiver is, by operation of law, subrogated to all the rights of the real party in interest."

Also in

34 Cyc., 248,

is found the following text:

> "*Exercise of Supervision.*—The court may enlarge or vary its receiver's duties according as the facts may demand, and by supplementary order authorize him to do such things as may be necessary to accomplish the purposes of the receivership and for which no special authority is conferred by the order of appointment, upon its own motion, or upon the application of the receiver or interested parties."

The above text writer citing to support this text the case of

Sanger v. Upton, 91 U. S., 56 (23 Law Ed., 220).

The case of *Sanger v. Upton, Assignee, supra,* was cited with approval in the case of

Barbour v. National Exchange Bank, 45 O. S., 133.

So far as the powers of a receiver *with reference to the property of which he is vested as such officer,* are concerned, he has all the power and authority, under orders of the court appointing him, to do all things which an assignee might do or any other liquidating officer of an insolvent and dissolved corporation might do, for clearly the grounds upon which a receiver may be appointed under the laws of the State of Ohio, or the limitations thereof, have nothing whatever to do with the powers and authority of the receiver after his appointment. It is just as apparent that the pow-

ers of a receiver "respecting the property" (Ohio G. C. 11897) of which he is appointed receiver are just as broad as though he were vested with possession and control of the property as receiver in a dissolution proceedings and of an insolvent corporation or as assignee of the corporation by voluntary assignment. It would seem that the mere statement of this contention would be sufficient to sustain its truth. However, the courts of Ohio have uniformly held this proposition to be the law of the State for, as stated in

W. D. Sayle, Recr., v. The Guarantee S. & L. Co., supra,

> "A receiver of an insolvent corporation may commence and maintain a suit to set aside a fraudulent transfer of securities and recovery of possession thereof * * * all the authority in that behalf accorded to a receiver of a dissolved corporation is possession by a receiver of an insolvent corporation."

and in the case of

Cornell et al. v. Sulter, 13 O. C. D., 384,

the Circuit Court of Ohio held that

> "The assignee in insolvency proceedings is the proper party to prosecute an action to set aside a fraudulent transfer of property, or to have determined the rights of persons claiming liens on any of the assigned property by pledge or otherwise, and the priority thereof."

The situation presented by the case at bar is not the same as that presented by the facts in the case of

Scott v. Farmers Loan & Trust Co., 69 Fed., 17, cited by the lower court to uphold its decision that the State court in the instant case did not have the power to direct the Receiver to bring this suit. In the Scott case, the decision of the United States Circuit Court of Appeals for the Eighth Circuit was to the effect that a court of equity has no power upon a bill for the foreclosure of a railroad mortgage, to take into its custody or control, through a receiver or otherwise, property not covered by the mortgage, nor to make any order that will hinder or delay creditors in subjecting property not covered by the mortgage to the payment of their debts. The distinction between that case and the instant case is apparent. In the case at bar, the suit against Leach & Company, as we have heretofore stated, was with respect to the mortgaged property which concededly was properly vested in Grant, as receiver of the Furnace Company. On the other hand, in the Scott case, *supra*, the claim of Scott, intervener, was upon a judgment lien on the lands of the Railroad Company described in the petition and that the lien of the mortgages which the Trust Company sought to foreclose did not extend to or embrace such lands.

We believe that this Court, in the case of

> *Porter et al. v. Sabin*, 149 U. S., 473-474 (37 Law. Ed., 815),

has stated the rule applicable to the instant case in the syllabi of the case, as follows:

> "3. The receiver of an insolvent corporation is the proper party to bring a suit to enforce its rights of property; and if he does not sue, he

should be made defendant in a suit by stockholders in the right of the corporation.

"4. The court which appoints a receiver of the property of a corporation itself holds and administers the estate through the receiver as its officer and must decide whether it will determine for itself all claims of or against the receiver, or allow them to be litigated elsewhere."

Certainly the language of this Court in the last cited case as quoted above, to the effect that the court appointing a receiver must decide whether it will determine for itself all claims of or against the receiver or allow them to be litigated elsewhere, has reference to claims of or against the receiver pertaining to the property of which the receiver has control and possession (in this case the mortgaged property), the amount of money due upon which mortgage was questioned by Grant as Receiver in the case at bar and, under the direction of the Court of the Receiver's appointment, he could properly raise this question elsewhere than in the court of the Receiver's appointment.

Unquestionably, Grant, as Receiver in this case, could have intervened in the foreclosure suit on behalf of creditors whose interest in the mortgaged property in Ohio was fastened to the property itself.

(*Cheney v. Maumee Cycle Co., supra*),

upon his appointment as Receiver thereof, and had the State court in that case determine with jurisdictional authority so to do, as to the validity of all, or any part of the bonds, to recover the amount due upon which the Trustee had brought the foreclosure suit.

It seems just as clear, also, particularly under the holding of this Court in

Porter et al. v. Sabin, supra,

that the State court had the right and authority in matters so definitely a part of those involved in the foreclosure suit, to "allow them to be litigated elsewhere."

To put the matter concretely, if we were to assume, for the sake of argument, that the appointment of the Receiver by the Ohio court gave him no authority save to take possession of, and conserve and preserve the identical property covered by the mortgage and the fund to be realized therefrom, and to administer it for the benefit of legal bondholders, and the surplus, if any, for the benefit of creditors and stockholders, then, even in that situation, we think it could not be denied that it was not only the duty of the receiver, but also in the power of the court to order the Receiver, in order to conserve the mortgaged property, to defend against the foreclosure of any bonds illegally issued by the corporation in exchange for its own preferred stock contrary to the law of Ohio, and to thus convert a preferred stockholder into a preferred bond and mortgage lien holder, and to make in that case the same averments that were made in this instant affirmative case. Then, if it transpired that Leach & Company had sold these bonds, as appears by the records, to *bona fide* purchasers without knowledge of the fraud, it would have been the duty of the Receiver, and clearly within the power of the court in aid

of his conservation of the identical property mortgaged, to cross-petition against Leach & Company making them parties in that action, serving that company, a New York corporation, at its Cleveland office, and praying for the surrender of the bonds or in lieu thereof an accounting in equity for the amount of the purchase price of the bonds at the time of the illegal exchange by Leach & Company. In that event, the case could have been removed to the United States District Court and we would have had pending in that court, where this original case was commenced, the identical questions on the merits of the case that were litigated in the trial in that court, and we think no one would contend that the court had not ample authority and jurisdiction to order the Receiver to do these things, in order that the amount received at the foreclosure sale for the property should be augmented by the amount of recovery against Leach & Company in the event that Leach & Company was not in a position to surrender its bonds. Such action by cross-petition clearly would have been within the authority of the court to order, so that in the event these illegal bonds in the hands of innocent purchasers were protected in the distribution of the proceeds of the sale of the mortgaged property, that the funds should be to that extent replenished out of the pockets of the wrongdoer.

Now, in order to accomplish this, the court ordered the Receiver to conserve the property in that manner by conserving the proceeds of the property. It was the duty of the Receiver on behalf of the remaining bondholders at whose instance, through the Trustee, this Receiver was appointed and on behalf of the cred-

itors, to conserve, by any appropriate equitable action the fund realized from the sale of the property, so that in the event of a shrinkage in the sum realized to bondholders in a sale of the property, which let us add actually resulted, the fund available for this distribution would be increased to the exact amount necessary to take care of those holding bonds unlawfully issued and credited with the exact amount of money which Leach & Company should have paid in cash to the company upon the original exchange of the bonds for preferred stock.

The court then having authority to so direct the Receiver in the original action to accomplish that result, being strictly within the duty of the court and Receiver, in aid of the conservation of the corporation's mortgaged assets, how can any question be raised as to the authority of the court to direct this instant effectual action to be commenced in the Federal Court of the Northern District of Ohio, thereby accomplishing the identical relief which could have been accomplished under an order of the court to file a cross-petition against Leach & Company in the original action? If the court is empowered to conserve the mortgaged assets by appropriate action through the Receiver, how can there be any lack of power to conserve the proceeds of the property by augmenting the fund to the extent that it had been depleted by distribution in behalf of bonds illegally issued?

The learned judge, who wrote the opinion of the majority of the members of the Circuit Court of Appeals (R., 273), seems to proceed upon the theory that unless the trustee in the foreclosure suit questions the

validity of some of the bonds that a receiver, whose duty it was to safeguard the interests of all of the valid bondholders as well as the creditors and stockholders, cannot under order of the court attack the validity of any of these bonds. If such were the law, it would place the corporation in a sorry and helpless plight, as the Receiver could not under order of court raise those questions if the Trustee failed to do so. What remedy would either the other bondholders, creditors or stockholders have inasmuch as the Receiver had been appointed and he had full control of the mortgaged corporate assets, and whose duty it was to conserve the fund ultimately to be received from the sale of the property? No obligation was owing by the Trustee under the mortgage to the Furnace Company's general creditors, but the State Court and the Receiver owed the obligation to the company's general creditors and stockholders, as well as the *bona fide* bondholders, all of whose interest had become fastened to the mortgaged property, of seeing that their interests were protected, as held in

Cheney v. Maumee Cycle Co., supra, and
Sayle, Recr. v. The Guarantee S. & L. Co., supra.

The court below, however, stated in its opinion (R., 273 & 274).

> "This, of course, does not mean that those who suffered from fraud, if there was fraud, perpetrated upon the company in the issue and sale of the bonds, would be without remedy as, in that case, any injured precedent creditor or preferred stockholder could maintain an action for restitution. Whether such creditor or stock-

> holder would be permitted to intervene for that purpose in the foreclosure suit, and assert so hostile a claim to the objects of that suit, may well be doubted."

and further stated (R., 272):

> "We do not doubt the authority of the court to appoint a receiver in that case, but we do think that it would not have the power to direct him to take charge of any property not covered by the mortgage."

However, the question of the validity of each and every one of the outstanding bonds upon which the trustee had brought his action in foreclosure was clearly a matter pertaining to the property covered by the mortgage, and, while the lower court also, in its opinion in the first sentence of Record, p. 272, stated

> "that the powers of a receiver are limited by the purposes of the suit in which he was appointed,"

we can think of no question concerned in the purposes of a foreclosure suit more than the amount of money due upon the lien sought to be foreclosed.

In:

> *Mississippi Valley Trust Co. v. Railway Steel Springs Co. et al.*, 258 Fed., 346 (C. C. A., 8th Cir.), (Syl. 7).
>
> "A court, administering property already in its hands through a receivership, may properly draw to itself, all disputes as to liens and other rights upon or pertaining to such property."

Nor does Sec. 11897 Ohio General Code (*supra*), provide any such limitation to the powers of a receiver as

the lower court would impose in limiting those powers to "the purposes of the suit in which he was appointed" (R., 272); that section provides not only for the right of the Receiver to sue, etc., but

> "generally do such acts respecting the property *as the court authorizes.*"

Clearly, it could make not a particle of difference as to the right of the State court to grant authority to Grant, as Receiver, whether the authority was to contest the validity of the bonds in the hands of Leach & Company or require an accounting for the sale price of the bonds by Leach & Company in the event the latter had sold them to those who thereby became *bona-fide* holders for value; the interest of the bondholders, themselves, as well as the unsecured creditors of the Furnace Company, could only have been protected by the Receiver in one or the other of these two forms of actions, both of which, in the alternative, were sought to be maintained by him, and alternative relief, in conformity therewith, was granted by the District Court (R., 215).

As stated by the District Court (Hon. D. C. Westenhaver, D. J.) (R., 211),

> "Every bondholder had then and has now an interest in bringing about this result. The security back of his bond, as well as the future success of the corporation, gives him a right to compel this result."

The foreclosure suit, itself, was brought in the interest of these bondholders.

But, in addition to the authority which the State court might properly have granted to the Receiver in the foreclosure suit, is that which he might so properly grant in the Baldwin suit. The facts alleged by the preferred stockholder, Baldwin, in that suit (R., 254, 5, 6, & 7) are such as to clearly allege facts establishing an insolvent condition of the Furnace Company; certainly the facts alleged in that petition are such as from them the insolvent condition of the company might be naturally and reasonably deduced.

Cincinnati Equipment Co. v. Degnan (C. C. A., 6th Cir.), 184 Fed., 834.

Terry v. Tubman, 92 U. S., 156-170.

Mitchell v. Gazzam, 12 Ohio, 315 & 336.

Nor do we believe that it will be seriously denied here that where two cases are properly consolidated, as in the instant case, in which cases the prayers for remedial relief are identical, that all of the averments in each one of the petitions invoking the aid of the court to interpose with relief, in this case by receivership, must be taken together,—the one supplementing the other, as if all of the averments pertinent to the relief sought had been set out out in one petition. This being a case asking the foreclosure of a mortgage, supplemented by averments pleading beyond question the insolvency of the mortgagor and the shrinkage of its assets and the fact that under prevailing conditions the plant, property and assets could not be sold except at a great loss, and the utter inability of the corporation to pay even the interest on its mortgage or redeem the pledge of any of its quick assets or to pay anything

to its general creditors or to require an accounting by those creditors who had wrongfully appropriated its collateral security makes a very strong case, both under the statutes and under the equitable jurisdiction of the court for the appointment of this Receiver as ancillary to the prayer for foreclosure of the mortgaged property, and looking to the dissolution of the corporation. The object of the appointment of the Receiver contemplated the possession and control of *all* of the assets of the company, even to the extent of a dissolution of the company itself, if the financial requirements of the company could not be provided.

Brown Bonnell & Co. v. Lake Superior Iron Co.,
134 U. S., 530-6; 33 Law. Ed., 1021.

It cannot be reasonably denied, therefore, even if the allegations of the Baldwin petition were insufficient to warrant the appointment of a receiver under the statutory law of Ohio in that such relief was not ancillary to any other final relief for which prayer was made, that, nevertheless, the State court had at least jurisdiction of the subject-matter and the parties to the suit in the Baldwin case as well as the foreclosure suit, so as to constitute the decision of the United States Circuit Court of Appeals, for the Sixth Circuit, in the case at bar, a collateral attack upon the judgment of the State court in appointing a receiver in the Baldwin case and authorizing him to sue in the instant case.

And, again, these allegations of insolvency, etc., in the Baldwin petition, and the prayer for the appointment of a receiver upon this ground, were considered

by the State court as allegations and prayer for relief ancillary to the prayer for foreclosure in the Trustee's suit when the two cases were consolidated and the Receiver appointed in both of them.

The United States Circuit Court of Appeals for the Sixth Circuit, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in that—Second, it held that the authority of the State court to authorize the Receiver to sue Leach & Company could be questioned and attacked in this case.

The Circuit Court of Appeals, even had such an issue been made by the pleadings, had no jurisdiction to inquire into the power of the State court to authorize this suit, where, in a case such as this and where it is specifically admitted that the Receiver was *duly* and regularly appointed Receiver of *all* the assets of the Furnace Company, the raising of such a question in the instant suit constituted a collateral attack. The rule is, we believe, almost universal that such an issue can only be raised by direct attack in the proceedings appointing the Receiver.

In

> *Barbour v. National Exchange Bank,* 45 O. S., 133,

quoting from page 140 and 141 of the opinion,

> "It must be born in mind that here was an acting receiver. There was at least the form of a legal appointment, and that in a case which certainly invoked the discretion and considera-

tion of the court in the determination of the question whether an appointment could or ought to be made. This was jurisdiction. The Court acted. The appointment was made. The receiver proceeded to the discharge of the duties of the trust. This is not a direct proceeding to test the validity or regularity of the appointment. It is not a proceeding in error to review the order of appointment. It is a collateral inquiry. It is not enough that the court erred in its action. Unless it appear manifestly clear to us that the order of appointment was an absolute nullity by reason of the entire absence of jurisdiction in the court that made it, it cannot be assailed in this proceeding."

Now in the instant case, the regularity of the appointment of the Receiver over all the assets is admitted. See *Robertson v. Perkins, supra,* and Equity Rule Thirty. The decision of the Circuit Court of Appeals, therefore, constitutes a collateral attack; this question was not within its jurisdiction.

Egbert v. Building Assoc., 9 O. D., 646, Superior Court of Cincinnati (Syl. 4).

"Where a court has the power to appoint a receiver, which belongs to equity under certain circumstances, the exercise of that power, however erroneous, cannot be collaterally attacked."

In

Gunby v. Armstrong, 133 Fed., 417 (Syl. 3),

U. S. Cir. Court of Appeals, 5th Circuit:

"The regularity of the appointment of a Receiver by a court which had jurisdiction of the parties and the subject matter cannot be collaterally attacked."

Quoting further from the opinion on page 247, the Court says:

> "The rule has been clearly stated in the following language:
>
> 'The appointment of a receiver, by a court possessing general jurisdiction in law and equity, cannot be assailed collaterally, in any action or proceeding merely because such appointment was inequitable or erroneous; and so long as the jurisdiction, the inherent power—not the exercise of that power, but the power of the court itself to make it—is not questioned, the appointment is conclusive upon all parties until it is adjudged to be vacated in a direct proceeding instituted for that purpose by some party rightfully challenging it; and the presumption is that it was regularly made and that the court had jurisdiction to make it. If the decree was improvidently granted, or if for any reason it should be set aside or modified, relief can be had upon application by any party interested to the court by which it was made; but the regularity of the appointment of the receiver cannot be questioned by any other tribunal.' "

In

> *Collins v. Williamson,* 229 Fed., 59 (C. C. A., 6th, Cir.) (Syl. 2):
>
> "Under the rule that where a judicial tribunal has general jurisdiction of the subject-matter, and the special facts which give it the right to act in a particular case are averred, and not contraverted, upon notice to all the parties, jurisdiction is acquired, and cannot be assailed

in any collateral proceedings on a deed of general assignment made by a corporation under the Ohio statutes are not void because of the fact that the deed is filed and the proceedings are instituted in the insolvency or probate court of a county other than that in which the principal office of the company is fixed by its articles of incorporation, where the deed recites that the company is of the county in which the deed is filed, and no objection is made by any stockholder or creditor to the jurisdiction of the court, *which in such case can only be challenged by direct proceedings.*"

In

Lively v. Picton, 218 Fed., 401 (C. C. A., 6th Cir.) (Syl. 2):

"On a collateral attack upon the judgment of a court of competent jurisdiction, only jurisdictional defects can be considered."

Quoting from the opinion, on page 406,

"Turning, then, to the receivership proceedings in the Ohio court: the initial question thus is whether the Ohio court had jurisdiction to appoint a receiver; for as the order of that court is not directly, but only collaterally, attacked, the question of jurisdiction can alone be considered. That the order may have been erroneous, inequitable or ill-advised would not be enough to invalidate it here. Barbour *v.* Bank, 45 Ohio St., 133, 140, 141; 12 N. E., 5. Upon the general proposition that under collateral attack upon a judgment of a court of competent jurisdiction, only jurisdictional de-

fects can be considered; see Butterfield *v.* Miller (C. C. A., 6th Cir)., 195 Fed., 200, and cases cited at page 203, 115 C. C. A., 152."

This above quotation, we think, very clearly states the rule, and, *a fortiori,* does this apply when, as we have before shown, the jurisdiction of the court to appoint this Receiver was admitted by A. B. Leach & Company in their answer and amended answer in admitting all the averments of the first paragraph of the Receiver's petition. See Equity Rule 30 and the case of

Robertson v. Perkins, supra,

In

Butterfield v. Miller, 195 Fed., 200 (C. C. A., 6th Cir.) (Syl. 2):

"In a collateral attack on a judgment only jurisdictional questions can be considered, and, if the court was one of general jurisdiction, recitals of jurisdictional facts in its record are presumptively true, and can only be overcome by other evidence contained in the record."

See also the opinion on page 203.

Now all the jurisdictional questions are admitted in the instant case and no collateral attack can be made in it. The Circuit Court of Appeals was without jurisdiction to pass upon the precise point,—the only point on which it based its decision and reversed the decision of the district court.

In

Cincinnati Equipment Co. v. Degnan, 184 Fed., 834 (C. C. A., 6th Cir.) (Syl. 4):

"Where, in a creditor's suit against a corporation asking the appointment of a receiver, the defendant appeared and admitted the averments of the bill, which sufficiently alleged insolvency, and no collusion is charged, an intervener coming into the case after the appointment of a receiver cannot challenge the jurisdiction of the court to make such appointment."

(Syl. 5):

"Objection to jurisdiction in equity must be taken before the case has been entered upon on the merits, and an intervener who in his petition did not question the jurisdiction cannot do so after an answer has been filed to his petition and property has been surrendered to him under a stipulation."

Scott v. Farmers' Loan & Trust Co., 69 Fed., 17 (C. C. A., 8th Cir.):

We cite this case under this heading because it was cited by the Circuit Court of Appeals in its opinion and because this very case is in itself support of this Receiver in his contention that the Circuit Court erred. It will be noted that in this Scott case the one challenging the jurisdiction of the court did so by a direct proceeding by an intervention in the original case in which the receiver was appointed. Certainly, this case is no authority for a collateral attack upon the appointment of a receiver in a case like the instant

case where all the averments necessary to establish the jurisdiction of the State court are admitted and where no issue was made by the pleadings on that particular matter.

In:

Wagner Elec. Mfg. Co. v. Lindon, 282 Fed., 219 (C. C. A., 8th Cir.).

"While a national court may enjoin enforcement of a judgment of a state court, if inequitable, or for fraud practiced on the court or when the state court was without jurisdiction of the person, or the subject-matter, such relief cannot be granted, based on the fourteenth amendment, because the state court erred in its application of the law, *where its jurisdiction of the parties and subject matter were admitted,* especially where the state supreme court affirmed the judgment."

In:

Lydick v. Neville, 287 Fed., 479 (C. C. A., 8th Cir.).

(Syl. 1):

"Where a federal court had jurisdiction of the subject matter and the parties, its appointment of a receiver cannot be attacked collaterally on the ground that the allegations of the bill were not sufficient."

(Syl. 2):

"Where a writ of attachment from a state court had been levied on property of a corpora-

> tion, a federal court in which a suit was later commenced for appointment of a receiver for the corporation was without power to enjoin the state court from proceeding in the suit therein, or to interfere with its possession of the property."

Quoting from the opinion, page 482:

> "The state court having first obtained jurisdiction of the cause and possession of the property by the seizure under the writ of attachment the court below erred in interfering by injunction with this possession. This has been so frequently determined by the Supreme Court, as well as this and other national courts, that it is no longer an open question."

Citing many authorities, see page 483.

Now the allegations of the Receiver in the present case and the admissions of A. B. Leach & Company establish conclusively the jurisdiction of the court of the cause and of the possession of the property, and it was, therefore, gross error for the Circuit Court of Appeals to attempt to set up jurisdiction and under this assumed jurisdiction pass upon a point which was not at issue.

In:

> *Hartford Life Ins. Co. v. Johnson,* 268 Fed., 30 (C. C. A., 8th Cir.).

This case is an oft-cited case and contains numerous authorities. Quoting from syllabus 2:

> "Jurisdiction of the subject-matter of a suit depends on allegations, and not on facts, and

even if a court sustains its jurisdiction erroneously, when put in issue, its judgment is not subject to collateral attack, unless want of jurisdiction is shown on its face."

Quoting further, from the opinion on page 33:

"Jurisdiction of the subject-matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitled the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to the jurisdiction of the suit or proceeding."

Quoting further from page 34,

"It is true the jurisdictional allegations of a complaint may be put in issue by proper plea, but even in such a case the court in deciding such a plea exercises jurisdiction. Even if it sustains its jurisdiction erroneously, *the judg-*

ment is not subject to collateral attack, although cause for reversal upon appeal.''

In

Shields v. Coleman, 157 U. S., 168; 39 Law. Ed., 660 (Syl. 2).

"The circuit court of the United States, when property is in the possession of a receiver appointed by a state court, has no power to appoint another receiver and take the property out of the former's hands."

and on page 664,

"Undoubtedly the circuit court had authority under the bill filed June 6, 1892, to make the order appointing the receiver and taking possession of the property. Even if it were conceded that the bill was imperfect and that amendments were necessary to make it a bill complete in all respects, it would not follow that the court was without jurisdiction. The purpose of the bill—the relief sought—was, among other things, the possession of the property by a receiver to be appointed by the court, and when the court adjudged the bill sufficient, and made the appointment, that appointment could not be questioned by another court, or the possession of the receiver thus appointed be disturbed. The bill was clearly sufficient to uphold the action then taken."

Quoting further on page 664,

"But it is said that the receiver had no such interest in the property as will give him a standing in the circuit court to petition for the

restoration of the property to his possession, or to maintain an appeal to this Court from an order refusing to restore such possession. *This is a mistake.* He was the officer in possession by appointment of the state court, the proper one to maintain possession and to take all proper steps under the direction of the court to obtain the restoration of the possession wrongfully taken from him. It is a matter of every-day occurrence for a receiver to take legal proceedings, under the direction of the court appointing him, to acquire possession of property or for the collection of debts due to the estate of which he is receiver."

Quoting further on page 665,

"But, further, the question of right on the part of the petitioner antedates the final decree, and he stands in the Federal court backed by the order of the state court appointing him receiver, and directing him to press this application. If it were true that all the plaintiffs in the state court had abandoned their suit in that court, the remedy was *to call the attention of that court to the fact and have an order entered setting aside the appointment of a receiver, or directing the discontinuance of this application. We cannot, in this indirect way, pass judgment upon the action of that court.*"

In

Porter v. Sabin, 149 U. S., 473; 37 Law Ed., 815 (Syl. 6),

"A suit against a receiver appointed by a state court cannot be maintained, *nor the administration by that court of the estate in the*

receiver's hands be interfered with by a court of the United States, without permission of the state court, so long as the receivership exists."

Quoting further from page 818,

"The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, *deriving its authority from another government, though exercising jurisdiction over the same territory.* The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orlers of that court, remains in its custody, to be administered and distributed by it. *Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other."*

Quoting further,

"The state court, upon further hearing or information, may hereafter reconsider its former orders, so far as no rights have lawfully vested under them, and may permit its receiver to sue or be sued upon any controverted claim. But should it prefer not to do so, the right of action of the corporation against its delinquent officers, like other property and rights of the cor-

poration, will remain within the exclusive jurisdiction of that court, so long as the receivership exists.''

In

Wiswall v. Sampson, 14 Howard, 323,

the syllabus reads as follows:

"Where real estate is in the custody of a receiver, appointed by a court of chancery, a sale of the property under an execution issued by virtue of a judgment at law, is illegal and void."

quoting from the opinion on page 328,

"When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel v. Smith,* 9 Ves., 335, both with respect to receivers and sequestrators. *When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined pro interesse suo.* (1 J. & W., 176, *Brooks v. Greathed;* 3 Daniels Pr., 1984.) *And the doctrine that a receiver is not to be disturbed, extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined pro interesse suo; and this, though their right to the possession is clear.''*

In

Peale v. Phipps, 14 Howard, 459,

the syllabus reads as follows:

> "Two Statutes of Mississippi, one passed in 1843 and the other in 1846, provide that where the charter of a bank shall be declared forfeited, a trustee shall be appointed to take possession of its effects, and commissioners appointed to audit accounts against it.
>
> "Where these steps had been taken, and the commissioners had refused to allow a certain account, the Circuit Court of the United States had no right to entertain a bill filed by the creditors to compel the trustee to pay the rejected account. *There was a want of jurisdiction.*
>
> "The case is upon this point examined."

Quoting further from the opinion of Chief Justice Taney, on page 461:

> "We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the Bank as the agent and receiver of the Court of Adams County, and subject to its order, and was not authorized to dispose of the assets, or to pay any debts due from the Bank, except by the order of the court. He had given a bond for the performance of this duty, and would be liable to an action, if he paid any claim without the authority of the court from which he received his appointment, and which he was accountable. The property, in legal contemplation, was in the custody of the court of which he was the officer, and had been placed there by the laws of Mississippi.

> And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it, or to wrest it from the hands of its agent, and thereby put it out of his power to perform his duty."

If it shall be contended by our adversaries that the Circuit Court of Appeals did not ignor the unbroken line of authorities above cited precluding a collateral attack upon the judgments of the courts and shall refer the court to opinion of the Circuit Court of Appeals (R., 274) in which they have said:

> "We have had no occasion to consider whether the order appointing the receiver can be attacked in this case. The question is not whether that order is valid, but whether the receiver had authority, as he alleged, to bring this suit."

to that we make the very obvious reply that this case was brought pursuant to an order of the Ohio State court (R., 264) in which the Receiver

> "is authorized and directed to so commence the the action aforesaid against A. B. Leach & Company, Incorporated, in said court praying for such relief as should be obtained against said Company either for money judgment or otherwise, in order to reimburse the said Receiver for the apparent unlawful and illegal issuance of bonds by said Company to A. B. Leach & Company on or about May 15, 1922, in payment of * * * preferred stock."

Here then was the judgment of the court invoked by the Receiver and resulting in an order in a case in

which the court had full jurisdiction over all of the parties, the subject-matter and the Receiver. It involved the examination by the court of the probable merits of the case. It involved the question of how to conserve the funds or augment the funds distributable to the bondholders, creditors and stockholders of this corporation. It grew directly out of the issuance of the very bonds which were sought to be foreclosed secured by mortgage upon the assets of this corporation. It was as much a judgment and order of the court as the original appointment of the Receiver. If the original appointment could not be questioned or attacked collaterally, the court having full jurisdiction of the premises, how can any subsequent order or direction of the court involving an examination by the court of the facts be attacked in this collateral proceedings? The whole reasoning and logic preventing a collateral attack upon the judgment and orders of courts is based upon the theory of the integrity of the court's orders and judgments and for the sake of regularity and order of procedure forbidding the interference by other courts with the process of the State courts. The only procedure by which this order could be attacked would be by direct application to the court making this order.

The reasoning in some of the aforesaid cases cited in this brief supports our contention in this case. In addition thereto, we cite the court to the case of

Sanger v. Upton, 91 U. S., 56 (Syl. 1):

> "An order of court that the assignee in bankruptcy should proceed to collect a demand is con-

clusive as to the right of the assignee to bring suit thereon. The defendant in the suit cannot draw into question the validity of the order."

Upon the general proposition that orders of courts of competent jurisdiction are entitled to the same immunity from collateral attack as are final judgments, see

34 *C. J., Sec.* 816, pp. 515, 516.

Citing from the text but omitting extraneous matter as follows:

> "The rule against the collateral impeachment of judgment applied generally to all varieties of judgments, decrees or orders made by courts of competent jurisdiction, in all kinds of judicial proceedings * * *. The rule applies to orders or judgments * * * directing a receiver to pay claims, to levy an assessment *or to sue debtors.*"

Citing

Graves v. Denny, 84 S. E., 187.
Broch v. French, 116 Ill. A., 15.

The rule of immunity of judgments from collateral attack applies with equal force to orders of court.

Hogan v. Superior Court of California, 241 Pac., 584.

We think this rule applies in all its force in the Federal courts, and cite in support of that proposition

Voorhees et al. v. James Jackson, President of the Bank of the United States, 35 U. S. Supreme Court Reports, 448,

that part of the syllabus pertinent to this proposition is as follows:

> "There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. This rule applies as well to every judgment or decree rendered, in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged."

See, also—

Tilton v. Cofield et al., 93 U. S. Supreme Court, 163.

Upon page 165 of the opinion by Justice Swayne, cites with approval and comments upon the case of

Voorhees v. Jackson, supra,

and proceeds in his opinion as follows:

> "There being no fraud, neither the judgment nor anything which preceded or followed it could be properly made the subject of review by that tribunal."

and to the same effect is the case of

Jarrell v. Cole, 215 Fed., 315 (C. C. A. 4th Cir.).

Conclusion to Point A.

In concluding this argument upon Point A, first and second, of this brief, may we point out the importance

of the case and the questions involved herein concerning which it is claimed by your petitioner that the lower court "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision."

The case now involves, with interest, approximately $370,000—a large amount of money; in it is involved the question of the right of a Federal Court to, for all practical purposes, annul a judgment and order of a State Court of Ohio in a case in which the State Court had jurisdiction of the parties and the subject-matter; in it is also involved the question of the right of the lower court to depart from the accepted and usual course of judicial proceedings in suits by receivers as provided by the laws of the State of Ohio and the construction which courts of last resort of that State and the Federal Courts of the United States have placed upon those laws for many years.

In addition to all this, the injustice of the decision of the lower court is apparent and the case is important by reason of such injustice. If the Receiver finally recovers in this case, he will be bound to make distribution of the recovery under order of the State Court, to the parties entitled to it. The lower court, in its opinion (R., 273 & 4), stated:

> "This, of course, does not mean that those who suffered from fraud, if there was fraud, perpetrated upon the company in the issue and sale of the bonds, would be without remedy as, in that case, any injured precedent creditor or preferred stockholder could maintain an action for restitution."

We might add that the *bona fide* bondholders would also be entitled to restitution under these circumstances. It seems rather inconsistent, therefore, that your petitioner is not entitled to obtain such restitution for them, and also does it seem unjust and inequitable that this suit, so brought in their behalf, should be dismissed upon the pure technical ground that the State Court did not have authority to authorize your petitioner to maintain it on behalf of those whom the Receiver so represents.

POINT B.

The United States Circuit Court of Appeals for the Sixth Circuit, decided an important question of local law in a way in conflict with the applicable local decisions in that—First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit.

Under this heading, we again cite the case of

Cheney v. Maumee Cycle Co., 64 O. S., 205,

the first syllabus of which reads as follows:

> "An order appointing a receiver for an insolvent corporation which in terms makes him 'receiver for all the property and assets of the company, of every kind and description, wherever located,' is sufficiently broad to embrace the real estate of the corporation and is not invalid as respects such real estate because of the fact that the petition and motion in the case in which the order is made do not in terms refer to real estate, but, allegations otherwise

> being sufficient, prays 'that the court will appoint a receiver to take charge of all the property and assets of the company.' "

and we respectfully refer to the court's attention that portion of the opinion of the Supreme Court of Ohio as found in the last cited case on pages 214 and 215 to the effect that a receiver has a legal right in the property of which he is receiver and that the claims of creditors are thereby fastened upon it and the property held by the receiver as effectually as an assignee would have held it and that in no other way could the rights of the creditors be worked out. We also again cite the case of

> *W. D. Sayle, Receiver, v. The Guarantee S. & L. Co.*, 2 O. C. C. R. (N. S.), 401; affirmed by the Supreme Court of Ohio in 72 O. S., 639,

the first syllabus of which case reads as follows:

> "A receiver of an insolvent corporation may commence and maintain a suit to set aside a fraudulent transfer of securities and the recovery of possession thereof, and he may maintain such an action in his own name; all the authority in that behalf accorded to a receiver of a dissolved corporation is possessed by a receiver of an insolvent corporation."

and in this connection, we desire to quote also portions of the opinion of the Circuit Court in the last cited case, found on pages 405, 6 & 7, as follows:

> "It is well settled that one who conveys his property away for the purpose of defrauding his creditors, can not maintain an action to have

the property conveyed back to him, because, being guilty of a fraud in thus transferring his property, he must abide the consequences of such fraud. The executor or administrator is not a representative of the creditors of the decedent, but of the heirs and legatees, and they are entitled to no greater rights than the decedent himself. A receiver, however, is the representative of the creditors. The property is placed in his hands that it may be preserved and distributed to the creditors. The statute, as has already been said, provides for the bringing of such an action by the assignee, who is no more the representative of the creditors than is the receiver, yet the claim is not without force that since the one is named in the statute and the other is not, that the statute meant to make a distinction between them as to the right to bring a suit. No good reason seems to exist why the reperesentative of the creditors, by whatever name he is designated, should not have the right to bring such suit as the cerditor himself might bring.

In the case of *Monitor Furnace Co. et al. v. Isaac Peters et al.*, 40 O. S., 575, it is held that it is the duty of a receiver who was appointed for a dissolved and insolvent corporation to bring suit to set aside conveyances fraudulently made. The language used by Judge Nash in the opinion, on page 583, is:

" 'It is the right and duty of the receiver of a dissolved and insolvent corporation to pursue after and recover property which has been fraudulently conveyed before the dissolution.'

"To the same effect is the case of *The Smead Foundry Co. v. Chesbrough*, 16 Cir. Ct. Reports, 783,

"It is urged, however, that these cases differ from the one at bar in that the receiver in each of these cases was for a dissolved corporation appointed under R. S. Section 5587, and that his powers are found in R. S. Section 5590. Section 5587, paragraph 5, provides in what cases receivers may be appointed, in the following language:

" 'In the cases provided in this title, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.'

"And Section 5590 provides:

" 'The receiver shall have power, under the control of the court, to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect, compound for and compromise demands, make transfers, and generally to do such acts respecting the property as the court may authorize.'

"Paragraph 6 of Section 5587 provides for the appointment of receivers in all other cases where receivers have heretofore been appointed by the usages of equity.

"The receiver in *this* case was appointed for an insolvent corporation. By the usages of equity receivers have been so appointed time out of mind, so that it would seem that whatever actions a receiver appointed for a dissolved corporation might bring *this* receiver might bring.

"*In Whittlesey v. Delany*, 73 N. Y., 571, the first paragraph of the syllabus reads:

" 'An action to set aside and vacate a judgment against a corporation on the ground that

it was obtained without consideration, by collusion with the officers of the corporation, and in fraud of cerditors, may properly be brought in the name of and by a receiver of the corporation.'

"In Section 72 of Smith on Receiverships, this language is used:

" 'The power of the receiver to sue in his own name has been recognized however where the order of court so directs, or the statute so authorizes. But in the absence of such power he must sue in the name of the person or corporation over whose property he is appointed. * * *

" 'Where a court of chancery in the order of appointment confers power on the receiver to sue, he may do so on the principle that the receiver is, by operation of law, subrogated to all the rights of the real party in interest.'

"We are aware that many cases are reported which hold that a receiver in a case like this can not maintain the action in his own name. We hold, however, that this action can be so maintained. We see no reason why a receiver appointed for a dissolved corporation may under our statutes bring such action unless the receiver of an insolvent corporation may also maintain the action."

The lower court, in commenting upon the last cited case, stated (R., 274):

"Nor do we overlook *Sayle, Recr. v. The The Guarantee Savings & Loan Company* * * * That case is to be considered, we think, in the light of the further rule in Ohio that a court has no authority to appoint a re-

> ceiver, and therefore no power to confer, except in aid of the objects of a pending cause. When so considered, the decision in the circuit court and its affirmance without opinion in the supreme court can not be regarded as establishing a settled construction by the highest court of the State. The affirmance by the supreme court may have been upon some other ground than on which the action of the circuit court was based."

The question decided by the Circuit Court of Cuyahoga County in this last cited case was as to the right of a receiver to sue, and the court determined that a receiver of an insolvent corporation has the same authority in that regard as the receiver in a dissolved corporation. The Supreme Court of Ohio affirmed this judgment without report. We cannot see, therefore, the pertinence of the statement of the lower court when its opinion states that "the affirmance by the Supreme Court may have been upon some other ground than that on which the action of the circuit court was based." In Ohio, since 1857, the syllabi of the reported case is the law established thereby and the first syllabus of the Sayle case, *supra*, holds our contention in this case to be the law of the State of Ohio.

We further cite to the court under this heading the case of

Barbour v. National Exchange Bank, 45 O. S., 134, and quote from the second syllabus thereof as follows:

> "For the purpose of recovering back interest, paid by such corporation to a national bank, under section 5198, Rev. Stats. of U. S., providing for such recovery by "the person to whom it has been paid, or his legal representative," a receiver is a "legal representative" of such corporation, and authorized to prosecute an action for such recovery. *National Bank v. Trimble,* 40 Ohio St., 629, approved and followed."

We believe that the above-quoted rule of construction of the statutes of Ohio as to the powers of a receiver pretty clearly indicates that the Supreme Court of Ohio has at all times been wholly in accord with the rule laid down by the Circuit Court of Cuyahoga County, Ohio, in the Sayle case, *supra,* when the Ohio Supreme Court affirmed the decision of the Circuit Court in that case.

The courts of Ohio having determined that the rights and powers of a receiver of an insolvent corporation are the same as an assignee in insolvency proceedings would have, we look to the rule of law in Ohio as applicable to the rights and powers of such assignees, and cite in connection therewith the case of

Cornell v. Sulter, 13 O. C. D., 384,

the syllabus of which is as follows:

> "The assignee in insolvency proceedings is the proper party to prosecute an action to set aside a fraudulent transfer of property, or to have determined the rights of persons claiming liens on any of the assigned property by pledge or otherwise, and the priority thereof."

Also we quote the syllabus in the case of

Monitor Furnace Co. v. Isaac Peters et al., 40 O. S., 575,

as follows:

> "In March, 1876, the Monitor Furnace Company, a corporation, was dissolved by a decree of the court of common pleas of Lawrence county, and J. P. S. was appointed and qualified as receiver, to administer the estate under the direction of the court, for the benefit of creditors and stockholders. Before that time the furnace company made a sale of its real estate and other property for the alleged purpose of defrauding its creditors. In August, 1878, the receiver having taken no steps to have the sale declared void, L. B., a judgment creditor, commenced an action for that purpose in the same court that dissolved the corporation and appointed a receiver. The corporation and its stockholders, the receiver, the creditors and all persons interested were made parties defendant.—*Held:* That this action was substantially an application to the court to direct the receiver appointed by it to do his duty in the case stated."

We submit, therefore, that the decision of the lower court as to the authority of the Receiver in the instant case to maintain this suit is in conflict with applicable local decisions.

The United States Circuit Court of Appeals for the Sixth Circuit decided an important question of local law in a way in conflict with the applicable local de-

cisions in that—second, it held that the authority of the State court to authorize the Receiver to sue Leach & Company could be questioned and attacked in this case.

Under this heading, we again refer to the Court's attention the case of

Barbour v. National Exchange Bank, 45 O. S., 133,

the opinion of the Supreme Court of Ohio in this case clearly indicating the rule adopted in local decisions as to the question of collateral attack, quotations from which opinion are heretofore found on page ~~38~~ 40 of this brief.

To the effect that the judgment of the lower court in the instant case was a collateral attack upon the judgment of the State Court, we further cite the second syllabus of a case decided by the lower court in

Collins v. Williamson, 229 Fed., 59,

which is fully quoted on page ~~40~~ 43 of this brief. And we also cite another decision of the lower court to the same effect, to-wit, the case of

Lively v. Picton, 218 Fed., 401,

the second syllabus and portions of the opinion of which are quoted on page ~~40~~ 44 of this brief, and the further cases decided by the same court and upon the same question, of

Butterfield v. Miller, 195 Fed., 200,

the second syllabus of which is quoted on page 42 of this brief. Also the case of

Cincinnati Equipment Co. v. Degnan, 184 Fed., 834,

the fourth syllabus of which case is quoted on page 46 of this brief. For the citations of the authority of the Supreme Court of Ohio to the effect that the judgment of a court cannot be collaterally attacked, we cite the following:

Hart v. Menahan, 70 O. S., 201;
Children's Home v. Fetter, 90 O. S., 110;
Paulin v. Sparrow, 91 O. S., 279.

POINT C.

The United States Circuit Court of Appeals for the Sixth Circuit decided an important question of general law in a way untenable or in conflict with the weight of authority.

We believe, your Honors, that all we have said under Point A, First and Second, may be properly argued under this heading. The laws of the several states of the Union seem to us to be fairly uniform, and, while we have not encumbered this brief with citations of many decisions of courts of last resort of states of the United States other than Ohio, we have cited and quoted from decisions of the Federal Courts of the United States construing the laws of those other states, and believe that these authorities and those of Ohio as well as the logic and reason of them, are such

as to clearly indicate that the decision of the lower court in the instant case, both as to the authority of the Receiver and the attack upon the judgment of the State court in authorizing the instant case, *is untenable and in conflict with the great weight of authority.*

POINT D.

The United States Circuit Court of Appeals for the Sixth Circuit rendered a decision in conflict with the decisions of other United States circuit courts of appeals on the same matter in that—First, it held that the State court appointing the Receiver did not have authority to authorize the bringing of this suit.

We cite under this heading the case of

Mississippi Valley Trust Co. v. Railway S. S. Co. et. al., 258 Fed. (8th C. C. A.), 346,

the *seventh* syllabus of which is found on page 37 of this brief, and respectfully call your Honor's attention to that part of the opinion as found upon page 355 of the case as announcing a line of reasoning wholly applicable to the case at bar.

The United States Circuit Court of Appeals for the Sixth Circuit rendered a decision in conflict with the decisions of other United States circuit courts of appeals on the same matter in that—Second, it held that the authority of the State court to sue Leach & Company could be questioned and attacked in this case.

We cite under this heading the case of

Taylor v. Easton, 180 Fed. (8th Cir.), 363,

holding as follows:

> "5. A Circuit Court of the United States, in the absence of statute requiring notice of application for the appointment of a receiver, in the exercise of judicial discretion, may oppoint a receiver without notice; such appointment being subject only to direct attack for abuse of discretion."

We also cite the case of

Lydick v. Neville, 287 Fed. (8th Cir.), 479,

quotations from which are found on page ~~42~~ 47 & 48 of this brief.

We also cite to the court under this subject heading the case of

Wagner Elec. Mfg. Co. v. Lindon, 282 Fed., 219 (8th Cir.),

and particularly the quotations therefrom as found on pages ~~42 and 43~~ 47 of this brief. Again we cite under this heading the case of

Hartford Life Ins. Co. v. Johnson, 268 Fed., 30 (8th Cir.).

Quotations pertinent to this subject-matter are found on pages ~~43 and 44~~ 48 of this brief.

And as further indicating the conflict of a decision of a Circuit Court of Appeals other than those which

are cited above, we cite the decision of the United States Circuit Court of Appeals, for the Fifth Circuit, as found in the case of

Gunby v. Armstrong, 133 Fed., 417,

the third syllabus of which reads as follows:

> "The regularity of the appointment of a receiver by a court which had jurisdiction of the parties and the subject-matter can not be collaterally attacked."

and again and to the same effect, is the case of

Jarrell v. Cole, 215 Fed., 315 (C. C. A. 4th Cir.).

Conclusion of Brief.

We have thus argued our reasons for the granting of the petition for a writ of certiorari in this case upon four of the grounds suggested by this Court in Rule 35, Sec. 5, and feel that we have cited and quoted from an abundance of authorities to substantiate the points we have made upon them.

In addition to this, the case at bar is one involving the law of and the practice and procedure in suits commenced in the State of Ohio. The facts that the Hon. District Court originally decided this case for your petitioner and that the Hon. District Court Judge who sat upon the United States Circuit Court of Appeals, for the Sixth Circuit, dissented from the opinion of the United States Circuit Court of Appeals (both of these judges being Ohio lawyers) may or may not be of such importance as to indicate error in the decision of the latter Court upon the questions now

before this Court for determination, but we seriously urge here that the learned opposing counsel at the time the issues were made by the pleadings in the District Court had no thought in mind whatever but that the Receiver had full authority to commence and maintain this action. The records of the Receiver's appointment and the order to sue herein were at all times available to them, and it is fair to assume that they were fully cognizant of what the records contained; yet they admitted the due and lawful appointment of the Receiver and failed to deny his authority to sue.

Justice will not have been done, in our opinion, if this petitioner is not finally held by this Court, or the lower court, entitled to a recovery. The only grounds upon which the lower Court determined that the Receiver is not entitled to such recovery are so extremely technical and, we might add, so far beyond the average lawyer's or layman's idea of the fair administration of justice, as to call for a complete and final determination by this, the highest Court of the land.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the final decision in the case may be in accord with the law of the land and the decisions of other circuit courts of appeals upon the same matter, that the final decision in this case may be in conformity with applicable local decisions upon the important questions of local law involved herein, that the final decision in this case upon

important questions of general law may be tenable and in accord with the weight of authority, that the final decision herein may also be in accord with the accepted and usual course of judicial proceedings, and that fair and equitable justice may be done, and that to such an end a writ of certiorari should be granted and this Court should reverse the decision of the United States Circuit Court of Appeals, for the Sixth Circuit, and finally reverse and render final judgment for your petitioner.

Respectfully submitted,

J. P. WILSON,
Counsel for Petitioner.
A. M. HENDERSON,
Of Counsel for Petitioner.

(3373)

FILE COPY

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 9

HUGH W. GRANT, Receiver of the Struthers Furnace Company, Petitioner,

vs.

A. B. LEACH & COMPANY, INC.

REPLY TO BRIEF AND SUPPLEMENTAL BRIEF OF A. B. LEACH & COMPANY, INC.

J. P. WILSON,
Counsel for Petitioner.

A. M. HENDERSON,
Of Counsel for Petitioner.

(33,788)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 479

HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY, PETITIONER,

vs.

A. B. LEACH & COMPANY, INC.

REPLY TO BRIEF AND SUPPLEMENTAL BRIEF OF A. B. LEACH & COMPANY, INC.

MAY IT PLEASE THE COURT:

We shall confine this reply brief to the precise points discussed in the appellant's brief and supplemental brief. We shall not reply twice to the same argument urged by respondent in its brief and reiterated in a supplemental brief. We shall try to avoid reargument of the matters covered by our brief, except in so far as it is necessary to do so to preserve the continuity of this reply.

I.

The Federal District Court for the Northern District of Ohio, Eastern Division, is not a foreign court in the sense that a receiver appointed by a State Court in Ohio cannot sue therein.

All of the cases cited by the appellant in its brief are cases where a Receiver, appointed by a State Court, not being vested with title, has sought to sustain his action in a Federal Court located in a foreign state. We concede the rule to be that in such cases the State Receiver may not maintain his action therein. No cases cited in either of respondent's briefs sustain his position on this question. It is true that the State Court and the Federal Court derive their power from different sources, but we do not believe that heretofore it has ever been urged, certainly never decided, that the Federal Court for the Northern District of Ohio was foreign to the State Courts of Ohio. This Federal Court administers the law as determined by the courts of our state; its practice and procedure in the main are the same; its jurisdiction in many cases is concurrent with that of the State Court; it draws its juries in part from Mahoning County, Ohio, which lies within this district and Division of the district; cases are removable under the statute from the Common Pleas Courts of the District to the Federal Court under the Federal Statutes; it sits twice a year, holding two sessions in Mahoning County, Ohio, and its judges are residents of the district, two of them having been appointed from Mahoning County.

So far as the Federal Courts have laid down the rule of exclusion, the up-shot of the decisions seems to be this: "A Receiver appointed by a State Court cannot sue in a Federal jurisdiction other than that in which the Receiver was appointed."

Stroutt vs. U. S. Shoe Manufacturing Co., 195 Fed. 313 (4th part of syl. and opinion page 319).

Hale vs. Allison, 188 U. S. 56 (Second Section of 4th syllabus).

State Courts have decided that Receivers in Federal District Courts might sue in the courts of that district and state, they not being foreign courts.

Tardy on Receivers (Sec. Ed.), Section 700.

State vs. U. S. Fidelity and Guarantee Company, 81 W. Va. 184.

DeLano vs. Malcolmson-Houghton, 183 Mich. 62.

In a race between Receivers for the custody of property, the Supreme Court of the United States upheld the right of the Receiver appointed by a State Court to sue in the Federal Court of that district and to oust a Receiver appointed in an action of the same nature in that court.

Shields vs. Coleman, 157 U. S. 168.

In the recent case of

Harkins vs. Brundage, 275 U. S. at page 36,

a Receiver appointed in the Superior Court of Cook County, Illinois, successfully litigated in the U. S. District Court of that district against a Federal Receiver

appointed by that court for the possession of property then in the hands of the Federal Receiver.

It would be an endless task to cite the cases where State Receivers have brought actions in Federal Courts of that district in which to our knowledge no such question has been thought to be of sufficient merit to be raised. We think the Federal District Court for the Northern District of Ohio was the proper forum in which to prosecute this action.

II.

The appellee is not precluded from urging in this Court that under the pleadings in this case it has been admitted that this receiver is suing by virtue of authority conferred upon him by the court of his appointment to bring this action.

On page 19 of our brief, it is argued that under Rule 30 an averment of the original petition (Record, page 2) that "this action is brought by the Receiver by virtue of authority so to do granted to him by the court so appointing him as Receiver," was not denied by the answer. Neither was it denied by the amended answer of the defendant. Furthermore, that it was expressly alleged in those answers that the defendant "did not deny" that allegation.

The order of the court directing the Receiver to sue and the original petitions upon which the Receiver was appointed were not introduced in evidence in the District Court. The Circuit Court of Appeals took a different view of the matter and intimated to counsel

(see page 32 of the record) that a "decision upon the authority of the Receiver to sue, if it were based merely upon the absence from the record of the proceedings of the Common Pleas Court bearing upon such authority, would not be effective as a final decision upon that point and that the Court would therefore be inclined to remand the record to correct this omission in the proofs." Thereupon by consent of counsel of appellant and appellee the record was supplemented by the documents contained in supplement to transcript of record setting forth the original mortgage foreclosure petition, the petition of Baldwin and the journal entry appointing the Receiver, and the application to sue and the order to sue.

It is now claimed by appellant that, by voluntarily introducing further proof upon a point which the Circuit Court of Appeals held was in issue between the parties, but which we insisted was not at issue, because our averment had not been denied, we are, therefore, precluded from insisting at this time that the court was in error in holding that any proof at all was necessary.

The cases cited by respondent on page 9 of the supplemental brief do not seem to be germane to or authoritative upon this proposition. Does the question amount to any more than this? If in the trial of a law suit, a court erroneously holds that the burden of proof is upon the plaintiff upon a certain proposition, and the plaintiff thereupon goes forward to introduce such proof, does he waive the right thereby to predicate error upon the ruling of the court on that proposition

or may he still insist in error proceedings that no proof was necessary to be introduced by him, the averment which he introduces proof to sustain not having been put in issue? Such a rule would render nugatory the principle that it is only the questions of fact put in issue by pleadings that need be litigated, and that to shift the burden to the plaintiff of proving facts which the defendant had expressly stated he did not deny, would not make the probative effect of those facts an issue in the case.

This argument is made, of course, merely preliminary to our earnest insistence that if the court should hold otherwise on this question of pleading, the supplemental record introduced by consent shows ample authority in the court and in the Receiver to sustain this action.

DISTINGUISHING CASES CITED BY A. B. LEACH & COMPANY ON THIS CONTENTION ON PAGE 9 OF THE SUPPLEMENTAL BRIEF.

The cases cited by respondent, as we have before stated, do not appear to be authoritative at all in support of their contention. These cases are cited on page 9 of their supplemental brief. In the cases of *Jones Company vs. Munger Improved Cotton Mach. Mfg. Co.*, 50 Fed. 785, the court will note that there was an express request upon the part of the appellee that the cause be heard upon its merits and a disavowal on the part of the appellee of any desire on its part to take advantage of any irregularities which might have occurred in bringing the case up, or of any omission on

the part of the appellant to assign errors; we find in that case an express wish addressed to the court on the part of the appellee to wipe the slate clean of any irregularities or defects that might have occurred prior to the hearing in the lower court, and to confine the hearing in the reviewing court to a hearing on the merits.

In *Bloomfield R. Co. vs. Grace,* 112 Ind. 128 and 13 N. E. 680, on page 681 of the opinion in the N. E. Rpr., it will be seen that there was an express stipulation in the lower court between the parties that the matter to be determined by the reviewing court should be confined to one question only, and that question pertaining to the correctness of the lower court's ruling on the demurrer to the answer.

In *Riggs vs. Commercial Mutual Insurance Co.,* 125 N. Y. 7, 10 L. R. A. 684, on page 685 of the L. R. A. Report, it will be seen that there was an express stipulation by the plaintiff that he would waive his right to appeal to the reviewing court from the order of reversal in consideration of the defendant's consent that if a certain judgment should be affirmed, there should be a reargument in the case on the sole question of plaintiff's insurable interest, which consent was given.

The court rightfully held, we think, in all three of these cases, that the stipulating parties were bound by the express terms they had set out in their stipulations. In the instant case there is an entirely different situation. It has been the contention of your petitioner at all times that the burden was not upon the Receiver to prove authority in him to bring this suit

by reason of the fact that the answer and amended answer of respondent admitted this authority. Your petitioner has never at any time abandoned this contention. However, the Circuit Court intimated that unless the record were supplemented they would probably remand the case back to the District Court in order to require the admission of evidence. This, we think, was erroneous, but in order to facilitate matters, the stipulation relied upon by respondent was signed and the exhibits mentioned therein were introduced. Certainly this situation is plainly distinguishable from the cases cited by respondent.

III.

The Circuit Court of Appeals apparently overlooked the unbroken line of authorities of the Federal court in Ohio recognizing the powers of Ohio receivers as determined by the Supreme Court of Ohio.

We refer to pages 26, 27, 28, 29 and 30 of our brief to uphold our contention that the Supreme Court of Ohio has held that

> "Receivers appointed under Section 11894 of the General Code, or any sub-section thereof, have powers and title equivalent to the powers of assignees for the benefit of creditors and the same powers and authority as would be vested in the Receiver of a dissolved corporation."

Ihams vs. Saunders, 21 Fed. (Second Series), Opinion, page 252.

In re Bettman vs. Johnson, 250 Fed. 657, 12th and 13th part of syllabus and opinion, at page 667.

DuPont Powder Co. vs. Jones Bros., 200 Fed. 638, opinion of court, page 645.
Forcner vs. Citizens' Savings Co., 186 Fed. 5.
Cincinnati Equipment Co. vs. Degnan, 184 Fed. 834, Opinion, page 843.
Hamilton vs. Beggs, 179 Fed. 949, Opinion 952.

The Receiver then, by virtue of his appointment as Receiver of this insolvent corporation, having the same powers that he would have had if he had been appointed a Receiver of a dissolved corporation or that he would have had if an assignment had been made to him for the benefit of creditors, we come to inquire what would have been his authority in those events, referring the court to

Cornell et al. vs. Sulter, 13 Ohio Circuit Decisions, 384,

quoted on page 30 of our brief, and what would have been his authority if he had been appointed a Receiver in a suit to dissolve the corporation? We refer the court to Section 11945 of the General Code quoted on page 68 of our brief.

This Receiver then having inherent power, by virtue of his appointment, to institute suits to set aside fraudulent conveyances of property theretofore made by the corporation, and representing for that purpose not the corporation itself but its creditors, stockholders, and bondholders, it is difficult to understand how the fact that this particular equitable demand asserted by the Receiver can be said not to have been included in his powers because of the mere fact that it was not de-

scribed in or covered by the mortgage nor specifically referred to in the petition of Baldwin filed upon the same day as the foreclosure suit. It is no sufficient reply to this to urge that a Receiver could not have taken possession of specific real estate not covered by the mortgage. This suit grows out of the identical bonds for which the mortgage resting upon this particular property was given to secure. It is an inquiry primarily directed to the validity of part of those bonds. It seeks the restoration of those bonds and the expunging of their lien from the proceeds of the property, praying for the restoration of those bonds. It is in effect such a case as an assignee would bring for the benefit of creditors or the Receiver of a dissolved corporation would bring, acting as its liquidating agent, to set aside a fraudulent or unlawful conveyance, or if that can not be done by reason of the protection afforded to *bona fide* holders of those bonds by purchase from Leach & Company, then in aid of the Receiver's undoubted duty to conserve the *proceeds* of the property, that the wrong-doer should account in equity to the end that so much of the proceeds as would be swept away in payment or part payment of the bonds unlawfully issued, should be restored and the proceeds to that extent be augmented by recovery against Leach & Company either for the benefit of the valid bondholders in case of a shrinkage in value of the property, or for the benefit of creditors if the property should be sufficient to pay all the bonds.

The Circuit Court of Appeals aparently proceeded upon the theory that, because no averments were made

in the foreclosure case as to the invalidity of these bonds, and therefore no issue made in that case as to their invalidity, the Receiver, under order of court, had no power nor could power be conferred upon him by the court to inquire into the validity of these bonds.

If Leach & Company had still held these bonds, is there any question that the Receiver could have defended against their foreclosure, in view of the fact that the trustee at all times knew, by reason of the fact that the trustee itself effected the physical exchange of bonds for stock, (see page 145 of the record) of the invalidity of those very bonds? If the trustee is unmindful of its duty to those admittedly holding valid bonds who are interested in the security back of their bonds, is the Receiver, by reason of the trustee's omission to raise the issue, precluded from doing so, representing as he does not only the creditors but the valid bondholders also? We believe that it was not only within the power, but it was the duty of the Receiver to institute this proceeding, and entirely within the jurisdiction of the court to so order the Receiver to proceed.

Mississippi Valley Trust Co. vs. Railway Steel Springs Co., 258 Fed. 346 (C.C.A. 8, Circ. Ct. Syl. 7. Note page 37 of our brief).

Porter vs. Sabin, 149 U. S. 473, 474 (38 Law edition 815, 4th part of syl. Note page 32 of our brief).

IV.

The court had jurisdiction of the parties and subject-matter of mortgage foreclosure case and of the Baldwin case. It had jurisdiction to consolidate the action, it had jurisdiction to appoint a receiver, and jurisdiction to order the receiver to proceed with the present action.

Passing for a moment the question of the right of Leach & Company to challenge the validity of the order of the State Court, and considering the jurisdiction of the court as shown by the record contained in the supplement to the record filed in the Circuit Court of Appeals, we find that this is a case for the foreclosure of a mortgage against a corporation which has defaulted in the payment of the interest upon its bond, from which it definitely appears that this corporation can not pay its debts in the usual course of business. An express averment of its insolvency is by no means necessary. Its inability to pay its current obligations, particularly its mortgage indebtedness, establishes its insolvency under the laws of Ohio.

Mitchell vs. Gazzam et al., 12 O. Rp. 315 and 336.

American Can Co. vs. Erie Preserving Company, 171 Fed. 540 and 542.

Cincinnati Equip. Co. vs. Degnan, 184 Fed. 834.

Pacific Northwest Packing Co. vs. Allen, 109 Fed. 515-518.

In addition to this, as we have said, it abundantly appears from the petition in the Baldwin case that the

corporation was hopelessly insolvent and very heavily indebted to past creditors, and that its tangible property was being swept away by pledgees, at greatly depreciated values, who had failed to account to the corporation.

Turning now to Section 11894 of the General Code, page 23 of the original brief, in section 2 the right is given to a mortgagee in foreclosure cases to the appointment of a Receiver "*when it appears* that the mortgaged property is in danger of being lost, removed or materially injured," *or* "that the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt." Reading this in connection with sub-division 5, page 24 of brief, also Receivers are appointed in cases provided in this title, (a mortgage foreclosure is one of the cases provided in the title), "when a corporation has been dissolved or is insolvent or in immediate danger of insolvency."

The question at once arises—how is it to be *made to appear* to the court that the corporation is insolvent or in danger thereof, or that the property is probably insufficient? It is contended in defendant's brief that those facts must be stated in the mortgage foreclosure petition. Even if that were the rule, sufficient is alleged in the mortgage foreclosure petition from which the court, under the authorities just cited, could reasonably infer insolvency. But such is not the rule. On the application for a Receiver on a mortgage foreclosure petition it is everywhere the general practice, if need be, to show either by affidavit or oral evidence the insufficiency of the property or the insolvency or

imminent insolvency of the corporation so that it shall *appear* to the court, in the language of the statute, that those facts exist, calling for the appointment of a Receiver. Time after time Receivers have been appointed in foreclosure cases on application and proper showing of the necessity therefor.

Now we have the Baldwin case filed the same day under oath of the petitioner setting up in detail the facts which constitute insolvency. These cases were consolidated and the court, exercising its jurisdiction, appointed a Receiver in the consolidated case entitled Guardian Savings & Trust Company, Trustee, *vs.* A. B. Leach & Company. If the averments in the Baldwin petition be considered to be no more than an *affidavit* of the facts, there appears from the face of the record to have been ample evidence before the court of the insolvency of this corporation, its huge indebtedness and its inability to pay its debts in the regular course of business or to redeem even its pledged stock on hand. Everything necessary to be done or to be shown to the court to authorize the appointment of this Receiver will be conclusively presumed to have been done and shown, so that it appears to the court that a Receiver was necessary. Moreover, it appears from the face of the record itself that in the mortgage foreclosure case, supplemented by the sworn verified facts in the Baldwin case, that it was abundantly made to *appear* to the court that a Receiver should be appointed both because there was a default in the mortgage and because of the insolvency of the corporation and the probable wasting of its assets. Certainly no one could take advantage of the fact that these actions were

consolidated by the court on his own motion except the parties affected by that consolidation. No question was made by the Circuit Court of Appeals as to the validity of the Receiver's appointment. See record at page 272.

Both petitions and præcipes for summons were filed January 15, 1925. The Receiver was not appointed until January 20, 1925. It will be conclusively presumed, which is in fact the truth, that summons was immediately issued which constitutes the pendency of the case under *General Code of Ohio, Section 11279*:

> "A civil action must be commenced by filing in the office of the Clerk of the proper court, a petition and cause a summons to be issued thereon."

Even though the Receiver had been appointed on the same day, it would be presumed that each was in its proper order.

Ellwood vs. National Bank, 41 Kansas 475.

A Receiver may be appointed either under a prayer for such relief in the petition or on a motion subsequently filed.

Bates New Pleading and Practice, Volume 1 (Ohio), page 722.

In *Clonne vs. Bradstreet*, 2 Handy (Ohio), opinion of the court at page 77 (affirmed 7th O. S. 323), it appeared that there had been no prayer for a Receiver in the petition itself. The court says on page 77:

> "The power to appoint a Receiver is so fully conferred by section 253 of the code (the old

> code section), that in every proper case, we think, it may be exercised without a formal petition; and whenever it shall appear on trial, or at the time the decree is entered, that the interests of the parties who have claims on the fund require its protection, a Receiver may be appointed. The 2d, 3d, 4th, and 6th clauses of the section of the code, already referred to, not only specify the particular cases in which the power may be exercised, but seem to make the duty to appoint imperative on the court, if the circumstances require it, to prevent a failure of justice."

Again it is held in

Hotenstein vs. Conrad, 9 Kans. 435

and

Commercial Savings Bank vs. Corbett, 5 Sawyer 172,

that a pleading, in which the appointment of a Receiver is sought, need not set out facts showing the necessity thereof, but need only disclose that the action is one of the claims in which such appointment is authorized. The grounds for it are left to the motion.

In *Bates New Pleading and Practice,* Volume 1 (Ohio), at 723, it is held:

> "The extent or limits of the power (of the receiver) will be defined in the order of appointment, and can be enlarged from time to time, according to the exigencies of the case."

In Ohio, a prayer for general alternative relief such as occurs in the petition of the Guardian Savings &

Trust Company *vs.* A. B. Leach & Company, (see page 15 of the supplement to transcript of record) entitles the court to grant any redress to which the party is entitled.

Bates Pleading and Practice, Volume 1, pages 36-306.

Draper vs. Moore, 2 Cincinnati (Superior Court Reports) 167 opn. of ct. page 174, citing Davenport *vs.* Sovil, 6 O. S. 462.

Brundridge vs. Goolove, 30 O. S. 374.

Riddle vs. Roll, 24 O. S. 572.

Davenport vs. Sovil, 6 O. S. 462.

V.

The attempt of Leach & Company to question the jurisdiction of the Court to order the receiver to sue and to question the authority of the receiver under that order, constitutes a purely collateral attack upon the judgment and orders of the Court of competent jurisdiction.

It is admitted by the respondent (see respondent's supplemental brief, bottom of page 21) that this is a collateral attack upon the orders in question. On page 22 of that brief a number of cases are cited to the effect that a judgment affecting individual rights of persons not parties or privies to a proceeding, where such persons were adversely affected by the judgments rendered therein, is not immune from collateral attack. The obvious reply to this line of reasoning is that this direction of the court to proceed against Leach & Company does not purport in any manner whatever to adjudge or determine or to affect in any manner any ma-

terial rights which Leach & Company has arising out of the subject matter of the intended suit. The order of the court, on page 30 of the supplement to transcript of record, simply directs the Receiver to obtain from said company (Leach & Co.) such relief as should be obtained against said company. It is an ordinary direction and authority of the court conferred upon the Receiver to test the question of the validity of the alleged invalid transaction and in no sense adjudges any matter or thing whatever against Leach & Company, and so far as that is concerned, the order of the court is immune from collateral attack.

Much criticism is made in respondent's briefs of the infirmity of the petition filed by Baldwin, in that it is claimed that no equitable relief, save the appointment of the Receiver, is prayed for in that petition.

It is true that the petition does not pray that the creditors, who have exercised their pledges and sold large amounts of tangible assets at a great sacrifice, should account in equity to the corporation, on whose behalf he sues, for the reasonable value of those assets; but it does set forth facts showing conclusively the insolvency of the corporation and the immediate need of a Receiver under the statutes.

This was a case pending in court; it was consolidated by the court with a mortgage foreclosure case; its averments were considered by the court and whether we shall say that they were considered in the light of a petition or as a mere affidavit, they did make it *appear to the court* that a Receiver should be forthwith appointed to conserve the proceeds of all of the property of the corporation, which is admittedly the scope of

the court's order. (See original record setting forth the petition, page 2, and the answer of Leach & Company, pages 9 and 19.)

Now of what avail is it to Leach & Company to urge that the petition of Baldwin was fatally defective in the respects pointed out, that it would not have withstood a demurrer, that it was error for the court to act upon that petition, or that it was grossly irregular for the court so to act upon that petition conjointly with the admittedly competent averments in the mortgage foreclosure case? If all of these defects, infirmatives and irregularities were admitted, still the court had jurisdiction to act to make its judgments and orders in the consolidated case, and no question of error in the court's procedure, even though that error was sufficient to reverse the judgments and orders, can be urged as a reason for making this collateral attack upon the court's order.

We respectfully submit that there is a wide difference between the erroneous exercise *of jurisdiction* and the lack of power to exercise any jurisdiction. In this connection we cite the case of

Jarrell vs. Cole, 215 Fed. 315, 4th Circuit,

for the reason that the judgment of the court reviews the various cases from the Supreme Court of the United States defining the extent to which Federal Courts have gone to protect judgments, decrees, and orders of court from collateral attack.

In *Jarrell vs. Cole et al., supra,* page 318 of the opinion, it is stated:

> "The courts go to great lengths in upholding judgments and decrees which are assailed in collateral proceedings for want of jurisdiction to render them. Especially is this so where, as in the case at bar the adjudicating tribunal had jurisdiction of the parties and the subject-matter. Indeed, it is little less than surprising to note the omissions and defects, the lack of material averments and other irregularities, which have been held insufficient to impeach jurisdiction."

The case of

Spoors vs. Coen, 44 O. S., 497,

relied upon by the appellant and cited in his brief, was a case where it was attempted to sell land of a decedent which had been fraudulently conveyed, by a proceeding in the *Probate Court,* which court had no jurisdiction whatever to hear or determine any such cause (see first part of syllabus of said case), the jurisdiction to do so being vested in the Court of Common Pleas. In that case, there was a total lack of jurisdiction, but as the court says in that case, on page 502, a judgment rendered by a court of competent jurisdiction in a case brought before it, however erroneously the jurisdiction may have been exercised, is one thing, and a judgment entered by a court of like jurisdiction in a case not before it is another and a different thing.

In the above case of *Spoors vs. Coen,* the Supreme Court of Ohio, opinion page 503, has stated:

"It is not necessary that the statement of the claim should be so perfect in form and substance, as to be free from objection *on demurrer*, to confer jurisdiction upon the court to hear and determine it. *Buchanan vs. Roy*, 2 Ohio St. 251 (should be page 252). If the case presented invoked the jurisdiction of the court, and could have been perfected by amendment, the judgment of the court thereon could not be treated as a nullity."

Assuming, for the sake of argument, that the petition in the Baldwin case had for its sole object the appointment of a Receiver, and that the Court acted upon the prayer of that petition in conjunction with the mortgage foreclosure case, can there be for that reason a collateral attack on the judgment or order of the court?

"The appointment of a Receiver can not be collaterally attacked on the grounds that the sole object of the suit wherein the appointment was made was the appointment of a Receiver."

See directly in point

McNary vs. Bush, 35 Oregon, 114; 56 Pac. 646 and 647;

and to the general purport

Shinny vs. North American Sav. & Loan Building Co., 97 Fed. 9.
Olmstead vs. Distilling Cattle-Feeding Co., 73 Fed. 44.

As to the wide discretionary power of courts in appointing Receivers and making orders directing their proceedings, see

Fletcher on Corporations, Vol. 8, Sec. 5234.

As to the distinction between the jurisdiction to appoint a Receiver and the exercise of that jurisdiction, see

Fletcher on Corporations, Vol. 8, Sec. 5212.

The decisions relating to collateral attack upon the judgments and orders of the court in appointing Receivers and ordering them to proceed, have been so fully argued in the light of the Ohio cases and Federal cases from pages 41 to 59 of our original certiorari brief that we deem it unnecessary to prolong this brief by reiteration of the argument and the cases therein fully set forth.

Upon the precise point that orders of court in the administration of an insolvent or other estate are as fully protected from collateral attack as the final decree, we refer the court without repetition to pages 57 and 58 of our original certiorari brief.

In conclusion, we join with the respondent in requesting, if it may be consistent with the practice in the Supreme Court, that in the event that this case be reversed, this court will retain its jurisdiction of the case to inquire into the merits of our contention upon the main subject of controversy which was not considered or decided in the Circuit Court of Appeals, allowing to the respective parties opportunity to file

such briefs as may be necessary in addition to the briefs upon the merits of the case filed in the Circuit Court of Appeals.

Respectfully submitted,

J. P. WILSON,
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Of Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 479

HUGH W. GRANT, Receiver of The Struthers Furnace Company,

Petitioner,

vs.

A. B. LEACH & COMPANY, INC.,

Respondent.

STATEMENT.

MAY IT PLEASE THE COURT:

WHAT THE CIRCUIT COURT OF APPEALS DECIDED.

The Circuit Court of Appeals merely held:

1. That in a simple suit by a trustee against a corporation to foreclose a trust deed securing bonds and covering only a part of the corporate property, a receiver could be appointed for only such property as was conveyed by the trust deed.

2. That such a receiver was a mere custodian of the property covered by the trust deed and was without title thereto—much less to the claims, if any, of the corporation, stockholders or creditors arising out of a contract for the purchase of all the bonds by another corporation for re-sale to investors.

3. That even though the court appointing him had, upon an *ex parte* application, directed that he bring suit against such other corporation he could not maintain such suit.

4. That the inability of Grant as receiver to maintain such suit was not cured by the facts that the same court in a stockholder's suit solely for the appointment of a receiver had appointed Grant receiver of all the corporate assets and directed him to institute such suit.[1]

It did not appear that there were any judgment creditors, or that the value of the property covered by the trust deed was insufficient to discharge the claims of all the bondholders. The corporate debtor had not been dissolved, neither had the court been asked to wind up its affairs. The foreclosure proceedings were predicated upon the validity of all the bonds, the deed of trust securing them, and the contract pursuant to which the bonds had been issued and sold and the deed of trust had been executed and delivered. Plaintiff in the *Baldwin* suit did not question the validity of either the contract, the trust deed, or the bonds.

Obviously, any suit against the original purchaser of the bonds would have to be instituted by some one who had a claim for redress. No such claim of either the corporate debtor or any stockholders, creditor, or other

1. This was in the *Baldwin* case (Tr. 254). As stated by the Circuit Court of Appeals:

"No claim was asserted against any one in the bill, and there was no averment of waste, mismanagement, or any wrongful act on the part of the corporation or directors, or that any of plaintiff's rights as a stockholder had been impaired or injured by any act of the company or its officers." (Tr. 271.)

Such a suit is unknown to the law.

person was covered by the trust deed. And none could be vested in the receiver by judicial fiat. The prosecution of any such suit would be not only foreign to the foreclosure suit, but antagonistic to it. So far as the Baldwin suit is concerned, it was a legal monstrosity. Juristically, it did not exist.

If the original purchaser of the bonds still held any of them, any equities between him and the corporation could be adjusted when he presented them for payment. If, on the other hand, the original purchaser had disposed of all the bonds, then the corporation, if so advised, might seek redress in an independent action. If stockholders had been wronged they had the usual means of redress. And why talk of the claims of other bondholders, when the record is barren of proof that they had sustained any injury, and when all their rights derive from the contract made by the debtor corporation with the original purchaser of the bonds, or of other creditors when the receiver's bill fails to show that there are any?

In other words, the Circuit Court of Appeals merely applied horn-book law to undisputed facts.

ESSENTIAL FACTS NOT STATED BY PETITIONER.

It would seem that Counsel for petitioner have evolved a novel method for procuring a writ of certiorari. The method consists in making a fragmentary, inaccurate and misleading statement of facts, and then asserting that the writ should issue for *all* the reasons enumerated in paragraph (b) of section 5 of Rule 35, regardless of the total irrelevance of such abstractions to the facts contained in the record.

Petitioner's statement *is* misleading, because it is both

inaccurate and inadequate. It fails to inform this Court that in the District Court, Grant, as Receiver, omitted to adduce *any* proof in support of the averment that

> "this action is brought by this Receiver by virtue of authority so to do granted to him by the Court so appointing him as Receiver." (Tr. 2.)

It fails to inform this Court that the Circuit Court of Appeals intimated that the absence of such proof would require a reversal (Tr. 266) and that pursuant to the Court's suggestion the parties filed in the Circuit Court of Appeals certified copies of certain orders, petitions, etc., relating to the appointment of the receiver and his authority to sue, as well as a stipulation that such documents might be considered by the Court "in the determination of this cause." (Tr. 235, 271.)

It fails to inform this Court that pursuant to the request of the Circuit Court of Appeals both parties filed supplemental briefs addressed to

> "the question whether authority to bring this suit either was or could be conferred upon the receiver, and be rightly based upon the pleadings, in connection with the controlling statutes and equitable principles, and whether such authority would or would not be rightly incidental to and consistent with the nature and purposes of his possession of those assets which passed to the receiver." (Tr. 267.)

It fails to inform this Court that petitioner made no objection to either the consideration by the Circuit Court of Appeals of the certified documents above mentioned, or the power of such court to inquire into the authority of the State Court to authorize the receiver to sue Leach & Company. (See appendix, p. i, *infra.*)

It fails to inform this Court that Grant's bill sought relief solely as the representative of The Struthers Fur-

nace Company, and not as the representative of creditors or stockholders (Tr. 2-8). This is important because, as we shall hereafter see, it vitally affects the powers of Grant as Receiver.

Grant's bill failed to show, either:

1. The nature of the proceedings in which Grant was appointed receiver; or

2. That The Struthers Furnace Company was at any time insolvent; or

3. That said company had been dissolved; or

4. That there were any creditors, either simple-contract or judgment, prior or subsequent to the transaction complained of; or

5. That a condition or covenant of the trust deed securing the bonds had been broken; or

6. That any bonds were then outstanding and unpaid, or the maturities of said bonds; or

7. That the transaction complained of had rendered the said company insolvent; or

8. That any creditors or anyone else had sustained any injury or damage by reason of the transaction complained of; or

9. That any stockholder had been deceived or misled; or

10. That any stockholder had not known of the contract of April 15, 1922; or

11. That any stockholder, officer, director, or creditor (if any, either prior or subsequent), had ever taken steps to set aside the transaction complained of; or

12. That such transaction prevented or hindered the redemption of other preferred stock out of the redemption fund.

The transaction complained of was the purchase by Leach & Company of The Struthers Furnace Company

bonds of the par value of $1,500,000, (secured by trust deed), pursuant to a written contract that expressly provided for part payment in preferred stock of The Struthers Furnace Company. This stock which was redeemable at $105 was received by the said Company at $85. (Tr. 51-4.) Leach & Company paid for the bonds the said 3,000 shares of preferred stock at $85 and $1,122,250 in cash. More than three years afterwards Grant, as receiver, brought an anomalous proceeding which was for neither rescission, specific performance, or damages. He tendered back the stock, but *not the cash.* He asked that a *nunc pro tunc* contract requiring Leach & Company to pay *all* cash for the bonds be made —which the District Court proceeded to do! Accordingly on this 'judicial' contract a decree for $312,375 was entered against Leach & Company. (Tr. 214.)

Plaintiff's claim was predicated solely upon two grounds, viz.:

1. That holders of seventy-five per cent of the outstanding preferred stock had not assented to the execution and delivery of the bonds and trust deed, upon the hypothesis that the 3,000 shares then held and voted by Leach & Company could not lawfully be voted or counted, because Leach & Company had a special interest in the matter by reason of its previous option agreement to purchase the bonds.

2. That the preferred stock could be redeemed solely out of the redemption fund, and not otherwise.

In support of its contention that plaintiff sought relief solely as the representative of The Struthers Furnace Company, and not as the representative of stockholders or creditors, the defendant relied upon, *inter alia,* the following propositions:

1. The general rule, that the receiver stands in

the place of the corporation, and has no right of action where the corporation itself has none.

2. *That in order to avoid the application of the general rule, a receiver must plead facts which clearly show that necessity exists for recognition of the exceptions to it.* Only by this means can he bring himself within such exceptions. If the corporation or the juristic person, whose receiver he is, is *insolvent* he should allege the fact, and then allege other *facts* which show that the rights of creditors or stockholders have been infringed in such manner that he may maintain an action which could not have been maintained by such juristic person or corporation. *It must appear from his pleading that he represents creditors and stockholders; that their rights have been infringed, and that he seeks relief as their representative as well as the representative of the corporation, if it have any in the premises.*

1 Tardy's Smith on Receivers (2nd ed.), p. 909.

Green v. *Sprague Mfg. Co.*, 52 Conn. 330, 361.

14 a Corpus Juris, p. 990.

3. That plaintiff's bill failed to aver that there were any creditors, much less that any of their rights had been infringed. That creditors cannot complain of merely *ultra vires* acts in the absence of injury therefrom.

4. That unlike directors or officers, a stockholder as such sustains no fiduciary relation to either the corporation or other stockholders, but may, by vote or contract, pursue his own interest, even though it is opposed to that of the corporation.

5. That the statutory requirement of the assent of holders of three-fourths of the outstanding preferred stock to the issuance of bonds secured by mortgage was for the sole protection of stockholders, and that Grant, as receiver, could not enforce any such special rights.

Westerlund v. *Black Bear Mining Co.*, (C. C. A. 8th Cir.) 20 Fed. 599, 613.

6. That since the stockholders were not parties to the contract of April 15, 1922, any suit by them would of necessity be a derivative suit in the cor-

porate right, and that if, in such a suit, the corporation could not recover, the stockholders could not.

Big Creek Gap Coal & Iron Co. v. *American Loan & Trust Co.*, (C. C. A. 6th Cir.), 127 Fed. 625, 633.

Collins v. *Penn-Wyoming Copper Co.*, 203 Fed. 726, 729.

Dickerman v. *Northern Trust Co.*, 176 U. S. 181, 203.

7. That plaintiff's bill did not show:

(a) any changes in the personnel of the stockholders since the execution of the contract of April 15, 1922; or

(b) that any stockholders who failed to sign a proxy or written assent were stockholders when Grant filed his bill; or

(c) any facts which justified, excused, palliated or explained the failure of stockholders themselves to seek relief.

McCampbell v. *Fountain Head R. Co.* (Tenn.), 77 S. W. 1070.

Dimpfell v. *Ohio & Miss. Ry. Co.*, 110 U. S. 209.

Collins v. *Penn-Wyoming Copper Co.*, 203 Fed. 727.

Union Trust Co. v. *Illinois Midland Ry. Co.*, 117 U. S. 434, 468.

Venner v. *Atchison T. & S. F. R. Co.*, 28 Fed. 581, 589.

GRANT'S POWERS AS RECEIVER UNDER THE OHIO STATUTES, ON THE DISTRICT COURT RECORD.

Grant averred that he had been appointed receiver of all the property of The Struthers Furnace Company by the Common Pleas Court of Mahoning County in the case of *The Guardian Savings and Trust Company, Trus-*

tee v. *The Struthers Furnace Company,* in case No. 56103 (Tr. 2). There was no averment concerning either the *Baldwin* case, or the nature of the case in which Grant had been appointed receiver.

In paragraph 2 of his bill, Grant averred, among other things, that—

> "this action is brought by this Receiver by virtue of authority so to do granted to him by the Court so appointing him as Receiver." (Tr. 2.)

Defendant's amended answer contained the following paragraph:

> "2. This defendant admits the allegations in the second paragraph of said petition contained, *save and except the allegation therein made that this action is brought by said Receiver by virtue of authority so to do granted to him by the court of his appointment; that this defendant has no knowledge or information as to the authority granted to said Receiver to bring said action* and therefore neither admits nor denies said allegations of the petition *but requires said plaintiff to make strict proof thereof.*" (Tr. 19.)

Under Rule 30 of the Equity Rules, the foregoing paragraph was effective as a denial of plaintiff's averment that the court that appointed him had given him authority to institute the suit against Leach & Company.

Brown v. *Pierce,* 7 Wall. 205, 211-2.

The words "therefore neither admits nor denies the allegations of the petition" are clearly irrelevant surplusage. Irrelevant or redundant matter does not render a pleading defective.

31 Cyc. 76.

Plaintiff could not have been misled. He could not have believed that defendant had admitted the averment that plaintiff had been granted authority to bring suit.

As heretofore stated, plaintiff offered no proof whatever in the District Court concerning his authority to institute the suit against Leach & Company.

Since there was no proof with respect to the nature of the proceedings that had led to Grant's appointment as receiver, and no averment that The Struthers Furnace Company had been dissolved, or that it was insolvent; and since no special statutory powers were relied upon by Grant, but solely the authority of the Court that had appointed him receiver, the defendant asserted that Grant had failed to prove an essential averment of his bill, and that consequently it must be dismissed.

The defendant pointed out that sections 11938-78 of 2 Page's Annotated Ohio General Code (1926) provides for the filing of a petition by

> "a majority of the directors, trustees or other officers having the management of the concerns of a corporation or stockholders representing not less than one-third of the capital stock of a corporation"

for the winding up thereof. That this might be done when the corporation was *insolvent,* or when the objects of the corporation had wholly failed, and in other like cases. That the aforesaid sections of the Code provided that upon the granting of such a petition a decree should be entered *dissolving* the corporation and appointing a receiver.

The defendant admitted that section 11945 provided that *such* a receiver should be vested with all the estate, real or personal, of the corporation, and that he should have all the powers conferred by law upon trustees to whom assignments are made for the benefit of creditors. But, obviously, Grant had not been appointed receiver in *such* a case. The title of the cause in which he had

been appointed was sufficient proof of this, to say nothing of the absence of averment and proof concerning the nature of the proceedings that led to his appointment as receiver, Grant's failure to aver that The Struthers Furnace Company was insolvent, or that it had been dissolved, his non-reliance upon the powers granted by section 11945, his express reliance upon the order of the Court, etc.

The defendant asserted that in the absence of averment and proof it would have to be assumed that Grant had been appointed receiver pursuant to *some* sub-section of section 11894 of the Code, which relates to receiverships generally. (See appendix, p. ii, *infra.*) That the Court could not assume that Grant had been appointed pursuant to any *particular* sub-section, because of the absence of both appropriate averment and proof. That there had formerly been in force section 11960, which provided for the dissolution of, and the appointment of receivers for, *insolvent* mining or manufacturing corporations upon the petition of "stockholders owning one-fifth or more of the paid-up stock." That the procedure was the same as the procedure for the appointment of a receiver upon petition filed under section 11938, and that, of course, the powers of *such* receiver were the powers enumerated in section 11945. That section 11960, had been repealed by the Act of May 31, 1911 (102 Laws of Ohio, p. 512); and that since then there had been no "special statutes" providing for the appointment of receivers "when a corporation has been dissolved or is insolvent, or in imminent danger of insolvency" other than sections 11938-78 which had no relevancy to the case at bar.

The point of the defendant's argument was, that there is a distinction in the laws of Ohio between the powers

of a receiver of a dissolved or an insolvent corporation and the powers of a receiver appointed pursuant to section 11894.

It was also asserted that insolvency alone was not a sufficient ground for the appointment of a receiver, and that in the absence of an averment of the fact, the Court could not assume that plaintiff had been appointed receiver, because The Struthers Furnace Company was involvent.

That section 11896 provided that a receiver apceiver appointed pursuant to section 11894 should execute a bond

> "that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein."

That Grant's powers as receiver were defined by section 11897, which reads as follows:

> "SEC. 11897. POWERS OF RECEIVER. *Under the control of the court,* the receiver *may* bring and defend actions in his own name, as receiver, take and keep *possession* of the property, receive rents, *collect, compound for, and compromise demands, make transfers,* and generally do such acts respecting the property *as the court authorizes.*"

(Sections 11894-11898 date back to the Act of March 11, 1853, 51 Ohio Laws, pp. 97-9.)

That section 11897 was especially significant when read in conjunction with section 9064 (2 Page's Annotated Ohio General Code (1926)), which enumerates the powers of railroad receivers. (Appendix, p. ii, *infra.*) That receivers of railroads had been given the power to sue and to be sued without leave of court because otherwise such power did not exist.

That an ordinary receiver, such as Grant must be assumed to be, was, pursuant to section 11897, a mere ministerial officer without authority to do anything except what he was authorized to do by the court that appointed him. That he could no more bring actions in his own name in the absence of authorization by the court, than he could compromise demands, or make transfers of the property held by him as receiver.

Cincinnati & Kentucky So. R. R. Co. v. *Cincinnati, N. O. & Tex. Pac. Ry. Co.* 6 Ohio N. P. 427.

That, whereas, a receiver of a *dissolved* corporation was "vested with all the estate, real or personal of the corporation," and was "trustee of such estate for the benefit of the creditors of the corporation and its stockholders" and had "all the powers conferred by law upon trustees to whom assignments are made for the benefit of creditors," a receiver appointed under section 11894 had no such powers. That the latter was a mere *custodian* of property without title thereto—a hand of the court. That he could act only under the control of the court.

Lafayette Bank v. *Buckingham,* 12 Ohio St. 419, 425.

Morley v. *Cleveland Hippodrome Co.* 23 Ohio C. C. (N. S.) 295, 297.

1 Tardy's Smith on Receivers (2nd ed.) § 338, p. 845.

That as stated in 1 Tardy's Smith on Receivers (2nd ed.) p. 835:

> "To justify any of his acts the receiver must be able to point to some order of the court bestowing either expressly or impliedly the right to do the act."

That the averment that the Court that had appointed Grant receiver had authorized him to sue Leach & Company was an *essential* one that had to be proved.

Rhodes v. *Hilligass* (Ind.) 45 N. E. 666.
Smead Foundry Co. v. *Chesbrough,* 18 Ohio Cir. Ct. R. 783, 6 Ohio Cir. Ct. Dec. 670.
Screven v. *Clark,* 48 Ga. 41.
Battle v. *Davis,* 66 N. C. 252.
Kennedy v. *Gibson,* 8 Wall. 498.
Barton v. *Barbour,* 104 U. S. 126, 26 L. ed. 672.
Pendleton v. *Russell,* 144 U. S. 649, 36 L. ed. 574.
Sterrett v. *Second Nat. Bank* (C. C. A. 6th Cir.), 246 Fed. 753, affirmed, 248 U. S. 73.
4 Pomeroy's Equity Juris. §§ 1601, 1602, 1604, 1606, pp. 3778 *et seq.*

STIPULATION AND DOCUMENTS FILED IN CIRCUIT COURT OF APPEALS, AND THE EFFECT THEREOF.

As above stated, the Circuit Court of Appeals intimated that Grant's failure to prove an essential averment of his bill would necessitate a reversal. We think that the court rightfully refused to decide the case upon the record made in the District Court. Otherwise, the parties would have been subjected to more expense and further delay.

At any rate, the petitioner then made no objection whatever to the course that the Court suggested. On the contrary, he stipulated that the documents in question might be filed for the consideration of the Court. Moreover, he filed a supplemental brief addressed to the questions upon which the Court desired further argument. In no form, nor at any time, did he question the power of the Court either to consider the aforesaid documents or to decide the questions above referred to.

Of course, the petitioner is now estopped to make any such objections in this Court. Certiorari is not a means for procuring the judgment of this Court upon questions which were not presented to or passed upon by a Circuit Court of Appeals.

There were filed in the Circuit Court of Appeals the following documents, which were no part of the record made in the District Court:

(a) Plaintiff's petition in the case of *Louis S. Baldwin* v. *The Struthers Furnace Company and The Guardian Savings & Trust Company, Trustee,* filed on January 15, 1925, in the office of the Clerk of the Court of Common Pleas of Mahoning County, Ohio (Tr. 254).

(b) Plaintiff's petition in the case of *The Guardian Savings and Trust Company, Trustee, Cleveland, Ohio,* v. *The Struthers Furnace Company, Struthers, Ohio,* filed on January 15, 1925, in the office of the Clerk of the Court of Common Pleas of Mahoning County, Ohio (Tr. 237).

(c) Journal entry of said Court made on January 20, 1925, in the Baldwin case (1) appointing Hugh W. Grant receiver in both of the cases above mentioned (2) authorizing said receiver "to take possession" of all the property of The Struthers Furnace Company, and (3) directing that all pleadings, proceedings and entries filed, had or made in the Baldwin case "with reference to the action or conduct of said receiver" should be filed, had and made in the Guardian Savings and Trust Company case with the same effect that they would have if they had originally been filed, had, or made in such case (Tr. 259).

(d) A like journal entry made on January 22, 1925, in the Guardian Savings & Trust Company case (Tr. 251).

(e) *Ex parte* application of the aforesaid receiver in the Guardian Savings & Trust Company case to sue A. B. Leach & Company, Inc., in the District Court of the United States for the Northern

District of Ohio, Eastern Division, filed in the said Court of Common Pleas on July 30, 1925 (Tr. 262).

(f) Journal entry of the aforesaid Court of Common Pleas, made on July 30, *1925,* in the Guardian Savings & Trust Company case, directing the receiver to sue A. B. Leach & Company, Incorporated, in the District Court of the United States, Northern District of Ohio, Eastern Division,

> "in order to *reimburse the said receiver* for the apparent unlawful and illegal issuance of bonds *by said company* to A. B. Leach & Company on or about May 15, *1922 in payment for which* said A. B. Leach & Company sold, assigned, transferred and set over to said company" 3,000 shares of the preferred stock of The Struthers Furnace Company (Tr. 264).

Of course the stipulation that the aforesaid documents should be filed for the consideration of the Circuit Court of Appeals modified the record that had theretofore been made in the District Court, whether by means of pleadings, or proof, or failure to prove. Otherwise, the stipulation and the additional record would have been an idle ceremony. This is particularly true, in view of section 391 of the Judicial Code, which provides, in part, that—

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment *after an examination of the entire record before the court,* without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

It necessarily follows that defendant's admission in the District Court that plaintiff had been appointed receiver for all the property of defendant is irrelevant and immaterial in view of the stipulation and the other proceedings had in the Circuit Court of Appeals.

Let us now consider whether upon *the entire record before it,* the Circuit Court of Appeals rightly decided the issues presented by the parties.

SUMMARY OF ARGUMENT.

I.

The State Court was without jurisdiction of the subject matter of the Baldwin suit which was brought by a stockholder solely for the appointment of a receiver.

II.

All that petitioner in the foreclosure suit showed, was that default had been made in the payment of interest and that the trust deed provided for the appointment of a receiver in such case. There was no showing that the mortgaged property was in danger of being lost, removed or materially injured, or that it was probably insufficient to discharge the mortgage debt, or that the defendant corporation had been dissolved, or that it was insolvent, or that it was in imminent danger of insolvency as required by section 11894 of the General Code.

It follows therefore that the appointment of Grant as receiver was contrary to statute and void.

III.

In simple foreclosure proceedings the power of a court to appoint a receiver is necessarily limited to the appointment of a receiver for the mortgaged property.

The alleged claim of The Struthers Furnace Company against Leach & Company under the contract of April 15, 1922, pursuant to which the bonds secured by the mortgage sought to be foreclosed were sold, necessarily was not a part of the mortgaged property.

The State Court was therefore without jurisdiction to direct the receiver to sue Leach & Company on the alleged claim.

IV.

The rights of neither creditors nor stockholders were involved or could be involved in the foreclosure suit; consequently the prosecution of any suit against Leach & Company is wholly foreign to, and inconsistent with not only the foreclosure suit, but the receiver's possession of the mortgaged assets. A receivership in foreclosure proceedings is entirely different from a receivership for winding-up a corporation, or in other suits which require liquidation of a corporation's assets.

V.

Grant was at most a mere custodian of certain corporate property. Section 11897 of the General Code does not vest him with title, and the order appointing him receiver did not even attempt to do so, but gave him possession only.

Since Grant was without title, the mere direction of the State Court that he bring suit against Leach & Company in a foreign jurisdiction conferred no authority in the premises.

The Federal Court in which the suit was brought was a foreign jurisdiction within the firmly settled rule above stated, and under the decisions of this Court, such court was without jurisdiction to entertain the aforesaid suit.

ARGUMENT.

I.

The state court was without jurisdiction of the subject matter of the Baldwin suit, which was brought by a stockholder solely for the appointment of a receiver.

No analysis of the petition in the Baldwin suit (Tr. 254) is necessary. The Circuit Court of Appeals has properly characterized it (p. 2, *supra*).

That the Court's decision was right, see:

1 Tardy's Smith on Receivers (2nd ed.) § 14, p. 51.

Mann v. *German-American Inv. Co.* (Nebr.), 97 N. W. 600.

Gillespie v. *Illinois Steel Co.*, 62 Ill. App. 594.

Callaghan v. *Consumers Ice, etc. Co.*, 13 Ohio Cir. Ct. 379, 7 Ohio Cir. Dec. 349.

Cincinnati, etc. R. Co. v. *Duckworth*, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618.

Gott v. *Schultze Co.*, 12 O. N. P. (N. S.) 206, 21 O. D. (N. P.) 604, 56 Bull, 397.

Bank v. *Lakeside Co.*, 19 O. C. C. 365, 10 O. C. D. 542 (affirmed without opinion *Bank* v. *Lakeside Co.*, 667).

Brown v. *Hose Coupling Co.*, 18 O. C. C. (N. S.) 328, 33 O. C. D. 70.

Valve Co. v. *Williams*, 25 O. C. C. (N. S.) 497, 28 O. C. D. 338 (motion to certify record overruled, *Williams* v. *D. J. Williams Valve Co.*, 14 O. L. R. 210).

Benson v. *Insurance Co.*, 7 O. N. P. (N. S.), 113, 19 O. D. (N. P.) 17.

DeLacroix v. *Steel Co.*, 8 O. N. P. (N. S.), 489, 19 O. D. (N. P.) 767.

Mere temporary cessation of business is no ground for the appointment of a receiver.

Murray v. *Superior Court of Los Angeles County* (Cal.), 62 Pac. 191.

Bartow Lumber Co. v. *Enwright* (Ga.), 62 S. E. 233.

Particularly where, as here, Baldwin not only does not complain of such cessation, but affirmatively shows that it was justified by the condition of the pig iron industry.

There was no *action pending*—no controversy between Baldwin and the corporation. The petition stated no cause of action. The Court was wholly without jurisdiction of the subject matter and all that it did in said so-called suit was *coram non judice* and void.

15 Corpus Juris, p. 853.

Where there is an absence of jurisdiction, not even the consent of all parties in interest can confer it.

1 Tardy's Smith on Receivers (2nd ed.), p. 63.

Section 11894 (Appendix, p. ii, *infra*), clearly does not authorize the appointment of a receiver upon Baldwin's petition. Subsections 1, 2, 3, 4, and 6 need not even be discussed.

Subsection 5 is also inapplicable for the simple reason that a receiver may be appointed only "in *causes pending*" (See first paragraph of section 11894). There was no *cause pending* (Authorities, *supra*).

Furthermore, the phrase "In the cases provided in this title" obviously means *the cases covered by subsections* 1, 2, 3, 4, *and* 6, *where a corporation is concerned.* Insolvency or imminent danger of insolvency is not enough under the statute, just as either is not enough in the absence of statute.

14A Corpus Juris, p. 958.

Baldwin did not allege facts which showed that the corporation was insolvent. All that he showed was an insufficiency of quick assets,—inability to meet commercial obligations as they fell due in the course of business. That is not enough. "Insolvency * * * means that the property of the debtor, real or personal, estimated at a fair and reasonable value, is substantially less than his debts."

"A corporation's stock is not to be reckoned as a liability in determining its solvency."

Hamilton v. *Menominee Falls Quarry Co.* (Wis.), 81 N. W. 876, 880.

Ratcliff v. *Clendenin* (C. C. A. 8th Cir.), 232 Fed. 61, 66.

Copper Belle Mining Co. v. *Costello* (Ariz.), 95 Pac. 94, 98; 100 Pac. 807, 810.

Tierney v. *Butler* (Ia.), 123 N. W. 213, 214 (3rd finding).

Richards v. *Haliday,* 92 Fed. 798, 799.

First Nat'l. Bank v. *Rice,* 22 Ohio Cir. Ct. Rep. 183, 187.

Baldwin's petition contains no allegation with respect to the assets of the company. Its assets may have been worth several times the amount of its liabilities. The petition nowhere alleges that the assets are insufficient to pay corporate debts.

And as heretofore pointed out (p. 11, *supra*), the only "special statutes" that provide for the dissolution of a corporation are sections 11938-11978, which have not the remotest relevancy to this case. They provide for the filing of a petition by "a majority of the directors, trustees or other officers having management of the concerns of a corporation, or stockholders representing not less than one-third of the capital stock of a corporation" for the *winding up* thereof.

Furthermore, no person is entitled to the appointment of a receiver unless he has some interest in or claim to or lien upon the property in question. Of course a mere stockholder does not fall within that category. A corporation is the owner of its own property, and a stockholder as such has no interest in it, or lien upon it or claim to it. In order that he may have a receiver appointed he must show fraud, collusion, mismanagement, waste, internal controversies resulting in a deadlock that imperils the corporate assets, etc., etc.

It follows, therefore, that in determining the power of the receiver to sue, we must look solely to the foreclosure proceedings. This results from the fact that the court had no jurisdiction of the Baldwin suit. Of course, the attempted consolidation was a nullity. There was nothing to consolidate the foreclosure suit with. Juristically, the Baldwin suit did not exist. It is a self-evident proposition, that if a court is without jurisdiction of a suit, any action taken therein is void. There were not *two actions* pending in the same court. As a matter of fact, the two suits could not be consolidated, even if Baldwin's petition had stated a good cause of action.

Section 11369 of the General Code of Ohio reads as follows:

> "When two or more actions are pending in the same court, *on motion and notice* to the adverse party, the *defendant* may require him to show why they should not be consolidated. If it appears that, *at the time the motion is made,* the *actions could have been joined* and if the court, or a judge thereof, finds that they ought to be joined, they shall be consolidated."

The so-called order to consolidate that was entered in the Baldwin suit on January 20, 1925, after referring to Baldwin's petition and the petition of The Guardian Savings & Trust Company, continued as follows:

> "and it further appearing to the Court that it will be for the best interests of all the parties to this action and the action of The Guardian Savings and Trust Company,. Trustee, *versus* The Struthers Furnace Company, so to do, The Court, upon its own motion and for the purpose of the appointment of a receiver to do the things for which prayers are made in the petitions filed in these cases, hereby consolidates the case of The Guardian Savings & Trust Company, Trustee, *versus* The Struthers Furnace Company No. 56103, with this case in so far as the questions of the appointment and acts and duties of a receiver are common to both the last mentioned case and the case now being considered by this Court."

It will be observed:

1. That there was no motion made by *either* defendant in the Baldwin case, or by the defendant in the foreclosure case.

2. That there was no notice given.

3. That the two actions could not have been joined.

4. That consequently the court could not of its own motion consolidate them.

However, let us look at the order of consolidation a little more closely. The court consolidated the two actions for the purpose of the appointment of a receiver to take possession of the corporate assets, but only "*in so far* as the questions of the *appointment* and *acts* and *duties* of a receiver are *common* to *both*" cases. The only acts and duties that could be *common to both cases,* would be the taking of possession of the *mortgaged* property and preserving it. It follows, therefore, that the *consolidated action* is no broader than the action for foreclosure, so far as the acts and duties of the receiver are concerned. And, as we shall hereafter show, a receiver in a simple foreclosure proceeding cannot maintain a suit such as Grant, as receiver, is here seeking to maintain against Leach & Company.

Even if a receiver had been properly appointed in the Baldwin case he would have only the powers specified in section 11897. He would not have title to the corporate assets.

However, we respectfully insist that in determining Grant's power to maintain this suit, all proceedings in the Baldwin suit must be disregarded.

II.

All that petitioner in the foreclosure suit showed was that default had been made in the payment of interest, and that the trust deed provided for the appointment of a receiver in such case. There was no showing that the mortgaged property was in danger of being lost, removed or materially injured or that it was probably insufficient to discharge the mortgage debt, or that the defendant corporation had been dissolved, or that it was insolvent, or that it was imminent danger of insolvency, as required by Section 11894 of the General Code.

It follows, therefore, that the appointment of Grant as receiver was contrary to statute and void.

For section 11894 of the General Code, which expressly specifies in what cases receivers may be appointed, see p. ii, *infra.*

A case precisely in point is that of

Baker v. *Varney* (Cal.), 62 Pac. 100,

the syllabus of which is as follows:

> "1. Code Civ. Proc. § 564, subd. 2, gives the court in an action to foreclose a mortgage power to appoint a receiver where the mortgaged property is in danger of being lost, removed, or materially injured, or the conditions of the mortgage have not been performed, and the property is probably insufficient to discharge mortgage debt. *Held,* that where, in an action to foreclose a mortgage, none of the reasons for the appointment of a receiver specified by section 564 existed, and the receiver was appointed under a stipulation in the mortgage, such appointment was void, since the parties could not stipulate so as to confer jurisdiction where none existed by law.
>
> "2. Where a receiver appointed to collect the rents and profits of mortgaged property pending foreclosure brought an action to recover possession of certain cattle claimed by him to be part of the rents and profits of the mortgaged property, the defendant might show in such action that the ap-

pointment was void on the ground that the court had no jurisdiction to make such appointment."

The "usages of equity" are also opposed to the appointment of Grant as receiver. In

1 Tardy's Smith on Receivers (2nd ed.), p. 34 *et seq.*,

it is said:

"The appointment of a receiver, on account of the serious consequences arising from an improvident exercise of this power, is hedged with all of the rules formulated by courts of equity as guides in the exercise of the powers which must necessarily be inherent in a court of equity. The similarity of the appeals to the conscience of the court in cases of receiverships and of injunctions has made applicable many of the well known rules which apply to cases in which injunction is sought. As has been already suggested, the principal purpose of a receivership is to preserve and protect the property which is the subject of the litigation for the benefit of the party who will be ultimately found by the court to be entitled to it, and the receiver is merely a ministerial officer of the court holding the property in trust for that purpose. Such being the main purpose of the remedy, it naturally follows that, in order to warrant the appointment of a receiver over property or a fund in litigation, there must be a showing of a danger that it may become lost, materially injured, or destroyed before the termination of such litigation. So, also, if it be shown that the property in litigation is in danger of being removed beyond the jurisdiction of the court, it is a sufficient ground for the appointment under the general rules applicable to the subject and also under the statutory provisions prevailing in most of the states, which are generally mere codifications of the chancery rules."

The author then goes on to state several other requirements which the petition in the foreclosure suit utterly fails to meet.

III.

In a simple foreclosure proceedings the power of a court to appoint a receiver is necessarily limited to the appointment of a receiver for the mortgaged property.

The alleged claim of The Struthers Furnace Company against Leach & Company under the contract of April 15, 1922, pursuant to which the bonds secured by the mortgage sought to be foreclosed were sold, necessarily was not a part of the mortgaged property.

The State Court was therefore without jurisdiction to direct the receiver to sue Leach & Company on the alleged claim.

In

1 Tardy's Smith on Receivers (2nd ed.), p. 577,

it is said:

> "The general rule of course is that the receivership can extend only to the property covered by the mortgage. But it might happen that the mortgaged property is so situated with reference to other property that the receiver can not effectively take possession of the former without also controlling the latter. In such a case the receiver's possession is extended over the entirety and the court makes proper provision for protecting the rights of the owners of the property not covered by the mortgage."

And again on p. 622:

> "In a foreclosure action, as in any other action, the jurisdiction of the court is limited to the issues raised by the proceeding; it can not permit nor compel parties not directly interested in those issues to be brought before it nor permit nor compel its receivers to take possession of property which is not the subject matter of the litigation."

And again:

> "Since the purpose of the receivership is to preserve the property involved in the action and hold it ready for distribution in accordance with the final

> decree of the court, in a foreclosure action, the receiver can be placed in possession only of the property covered by the mortgage and it is error for the court to direct the receiver to take possession of property not so covered." (p. 625)

It is clear that the alleged claim of The Struthers Furnace Company against Leach & Company could not possibly prevent effective possession of the mortgaged property by the receiver.

In

Scott v. *Farmers' Loan & Trust Co.* (C. C. A. 8th Cir.) 69 Fed. 17, 20,

Judges Caldwell, Sanborn and Thayer sitting—Opinion by Caldwell, Cir. Judge,—it is said:

> "When a bill is filed to foreclose a mortgage, the court may, upon a proper showing, appoint a receiver to take into his possession and control the mortgaged property. But the jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor can the court in such a suit rightfully make any order that will prevent, hinder, or delay the other creditors of the mortgagor from subjecting the property not included in the mortgage to the payment of their debts. A mortgagee has the undoubted right to subject the mortgaged property to the payment of the mortgage debt, to the exclusion of all general creditors of the mortgagor and persons holding junior liens thereon; but as to all property of the debtor not included in the mortgage the mortgagee is in no better plight than if he had no mortgage."

In

Bowman v. *Hazen* (Kan.) 77 Pac. 589, 595,

in a case where an order of the lower court was collaterally attacked, the Court said:

"The findings disclose that, in the action in which the receiver was appointed, nothing was involved but the title of lot No. 165, on Kansas avenue, in the city of Topeka. The title of Branner, who was Hazen's grantor, to one-half of the lot, was not disputed, and the only controversy was whether Josie Webb and Millie Nichols owned the remaining half, and that part they ultimately recovered. In that case the decision in the trial court had been given in their favor, and they had acquired possession of their shares in the lot when the receiver was appointed. The trial court undertook to vest the receiver with the custody of other valuable property which was in no way involved in the action wherein the appointment was made. Just why the receiver was given possession of Branner's half of lot No. 165, when his right to it was conceded, is not easily understood; but, when the court undertook to reach out and take custody and control of property which was not the subject matter of the controversy, it went outside of its appointed sphere, and its orders in respect to such property were nullities. The court had no more authority over that property than it would have had over the square on which the statehouse stands. The fact that the other real estate, which may be termed the outside property, was or had been in litigation between the same parties, did not enlarge the court's jurisdiction in the case in which the receiver was appointed. The outside property was entirely distinct from that involved in the action wherein the receiver was appointed, and the orders of the court as to the former were in excess of its jurisdiction, and to that extent, at least, absolutely void.

This question was directly adjudicated, first in the Court of Appeals, and later when the decision of that tribunal was affirmed in this court. *Branner* v. *Webb,* 10 Kan. App. 217, 63 Pac. 274; *Webb* v. *Branner* (Kan. Sup. 68 Pac. 1133. Since that determination there has been no excuse for contention as to the invalidity of the receiver-

ship, so far as the outside property was concerned. The orders appointing and directing the receivers were incurably void, and afforded no protection to the receivers, or those at whose instigation they were acting. Some of the money wrongfully taken from Branner through the medium of the receivership was returned to him by order of court, and because of this it is contended that Branner and his grantee cannot raise the question of invalidity, and that Hazen is precluded from recovering in this action. The money returned to Branner was his own, and at no time did he or Hazen acknowledge the authority of the receiver, or acquiesce in his action. They protested persistently and at every stage of the proceedings that there was no jurisdiction to appoint the receivers, and that their acts were utterly void.

As the orders were nullities, they may be attacked collaterally, as well as directly, at any time, by anybody, and in any proceeding where their validity is in issue. *In re Dill,* 32 Kan. 691, 5 Pac. 39, 49 Am. Rep. 505; *Gille* v. *Emmons,* 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609; *Whitmore* v. *Stewart,* 61 Kan. 254, 59 Pac. 261; *Johnson* v. *Powers,* 21 Neb. 292, 32 N. W. 62; *State* v. *District Court,* 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645; *People* v. *Weigley,* 155 Ill. 491, 40 N. E. 300; *Smith* v. *Los Angeles & P. R. R. Co.* 98 Cal. 210, 33 Pac. 53; *Staples* v. *May,* 87 Cal. 178, 25 Pac. 346; *Kreling* v. *Kreling,* 118 Cal. 421, 50 Pac. 549; *People ex rel. Railway Co.* v. *Judge,* 31 Mich. 456; *People ex rel. Railway Co.* v. *Jones,* 33 Mich. 303; *Spoors* v. *Coen,* 44 Ohio St. 497, 9 N. E. 132; *Thurber* v. *Miller,* 11 S. D. 124, 75 N. W. 900; *Vila* v. *Grand Island Electric, etc., Co.* (Neb.) 94 N. W. 136, 63 L. R. A. 791; *Van Fleet's Collateral Attack,* § 16; 17 Encyc. of Pl. & Pr. 752.

The orders did not give the receivers even color of authority as to the property not in litigation, and they were therefore trespassers, and are liable for all the moneys unlawfully collected. The plaintiffs in that action, who procured their appointment and aided and co-operated with them in wrongfully taking and appropriating the rents from the outside

property, are equally liable, as trespassers, for the wrong done.

It is contended that they should be credited with the disbursements made — especially as much of it was used for the benefit of the owners. Trespassers are not in a position to make such a claim. Those who wrongfully seize and hold the property of another cannot excuse themselves by showing that it was subsequently used for some good purpose, or that the use made of it was, to some extent, beneficial to the wronged party. Such trespassers cannot compulsorily constitute themselves disbursing agents of the one whose funds or property they have wrongfully seized, nor can they make themselves his debtor by paying his debts without his request or consent. It cannot be said that the measure and extent of recovery adjudged by the trial court was erroneous. As tending to sustain the ruling, the following cases are cited: *Shaw* v. *Rowland*, 32 Kan. 154, 4 Pac. 146; *Hagar* v. *Haas*, 66 Kan. 333, 71 Pac. 822; *Otis* v. *Jones*, 21 Wend. 394; *Higgins* v. *Whitney*, 24 Wend. 379; *Kerr* v. *Mount*, 28 N. Y. 659; *Wehle* v. *Butler*, 61 N. Y. 245; *Roff* v. *Duane*, 27 Cal. 565; *Olsen* v. *Upsahl*, 69 Ill. 273; *Garrigan* v. *Knight*, 47 Iowa, 525; *Hall* v. *Ray*, 40 Vt. 576, 94 Am. Dec. 440."

See also:

Staples v. *May* (Cal.), 25 Pac. 346.

State ex rel. Johnston v. *District Court* (Mont.), 53 Pac. 272.

The subject matter of the foreclosure suit was the property covered by the mortgage and none other. The mortgage did not cover all the property owned by the corporation. The mortgage itself, according to the petition of the trustee, provided among other things as follows:

"There is not included hereunder any corporate stocks owned by the company, nor any mined ore, coal, coke, supplies, manufactured iron, cash ac-

counts, bills receivable or current assets, all being expressly excluded herefrom." (Tr. 245.)

There is no allegation that any of the above described property was thereafter conveyed to the trustee, or that the trustee, at the time the petition was filed, claimed that any of such property was subject to the trust deed. The court, however, undertook to appoint a receiver for all the property of The Struthers Furnace Company. (Tr. 252.)

As theretofore stated, the alleged claim against Leach & Company was not, and, of necessity, could not be covered by the trust deed. Of course, the alleged claim was not mentioned in the trust deed, and there is no general language under which the alleged claim could be subsumed. The bonds were issued and the mortgage was executed pursuant to the alleged *ultra vires* contract of April 15, 1922, and it would be absurd to say that any party to the transaction intended to include in the trust deed an alleged claim against Leach & Company of which no one was aware.

It therefore follows that if the direction of the court to sue is tantamount to a seizure of property not covered by the mortgage—namely, the alleged claim against Leach & Company,—then the direction to sue is void. If, on the other hand, the order appointing the receiver is construed as a seizure of such property, the order is void so far as the property in question is concerned.

The title to this claim was undisturbed by the appointment of a receiver. It still rested in The Struthers Furnace Company. There was no assignment of it to the receiver.

The jurisdiction of the court to direct its receiver to

sue was necessarily limited by the nature of the proceedings. The court could not by means of a mere direction to sue vest the title to this claim in the receiver. It was no part of the mortgaged property. Such a suit would be entirely foreign to the purpose of the foreclosure proceeding. The plaintiff in the foreclosure proceeding would not be entitled to any part of the amount realized in the suit against Leach & Company. It would belong to The Struthers Furnace Company.

The direction to sue was absolutely void; at least it did not vest the title to such claim in the receiver.

See cases cited on pp. 36-7, *infra*. In these cases the court appointing the receiver had directed him to sue —but there, as here, the order was void.

IV.

The rights of neither creditors nor stockholders were involved or could be involved in the foreclosure suit; consequently the prosecution of any suit against Leach & Company is wholly foreign to and inconsistent with not only the foreclosure suit, but the receiver's possession of the mortgaged assets. A receivership in foreclosure proceedings is entirely different from a receivership for winding up a corporation or in other suits which require liquidation of a corporation's assets.

The foregoing principles are elementary and need not be elaborated on. In 19 Ruling Case Law, Section 327, page 525, it is said:

> "One of the leading purposes of a suit to foreclosure a mortgage is to secure such a decree as will enable the plaintiff to sell all the right and title that his mortgage covers, and enable a purchaser at the sale to ascertain what title it is that he buys. To attain this end it is usually necessary that all the claims held against the mortgaged premises should be adjusted. Ordinarily, therefore, all persons who are beneficially interested, either in the estate mortgaged or the demand secured, are proper parties to a suit to foreclose. This rule, generally will only embrace the mortgagor and the mortgagee, and those who have acquired rights or interests under them in the mortgagor's estate; for these are the only persons having any rights or obligations growing out of the mortgage, or interested in any manner in the subject matter of the action."

and again on page 536:

> "It is well settled that in foreclosure proceedings in equity unsecured contract creditors, having no judgment or other lien on the real estate, cannot intervene."

For the distinction between foreclosure proceedings and proceedings for winding up a corporation, see

Commonwealth Trust Co. v. *Salem Light, Heat & Power Co.*, 77 N. H. 146, 89 Atl. 452.

Neither the stockholders nor general creditors had any interest in or claim to or lien upon the mortgaged assets, and any cause of action which might be worked out through the corporation against Leach & Company for their benefit is wholly foreign to the foreclosure suit. A foreclosure suit is, of course, a proceeding *in rem*.

And yet Grant as receiver asked for leave to sue Leach & Company "for the benefit of the stockholders and creditors" and the court granted leave on the ground that

> "it is for the best interest of the creditors and stockholders of the company that such action be commenced."! (Tr. 264.)

V.

Grant was at most a mere custodian of certain corporate property. Section 11897 of the General Code does not vest him with title, and the order appointing him receiver did not even attempt to do so, but gave him possession only.

Since Grant was without title, the mere direction of the State Court that he bring suit against Leach & Company in a foreign jurisdiction conferred no authority in the premises.

The Federal Court in which the suit was brought was a foreign jurisdiction within the firmly settled rule above stated, and under the decisions of this Court, such court was without jurisdiction to entertain the aforesaid suit.

Grant's powers were only those specified in section 11897 of the General Code of Ohio (pp. 12-14, *supra*). As heretofore shown, Grant was a mere custodian—a hand of the court—and was not vested with title to the property in his possession. He had only the powers of a chancery receiver.

The rule is settled beyond all controversy that such a receiver even though directed to do so by the appointing court cannot sue in a foreign jurisdiction. The law is succinctly expressed in the syllabus in

Great Western Mining and Manufacturing Co. v. *Harris,* 198 U. S. 561,

as follows:

> "A receiver is an officer of the court which appoints him, and in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction upon the order of the court appointing him, to recover the property of the debtor. *Booth* v. *Clark,* 17 How. 338.

"A receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, as *every jurisdiction* in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to control the distribution of the funds realized within its own jurisdiction.

"Where the receiver can not maintain an action to recover property in a jurisdiction other than that in which he was appointed, jurisdiction is not established because the action is authorized to be instituted by the receiver in the name of the corporation, if it appears that in case of a recovery the property would be turned over to the receiver to be by him administered under the order of the court appointing him."

See also:

Sterrett v. *Second Nat. Bank* (C. C. A. 6th Cir.) 346 Fed. 753. Affirmed 248 U. S. 73.

Edwards v. *National Window Glass Jobbers Assn.,* 139 Fed. 795.

Fairview Fluor Spar & Lead Co. v. *Ullrich,* (C. C. A. 7th Cir.) 192 Fed. 894.

Booth v. *Clark,* 17 How. 322.

Hale v. *Allison,* 188 U. S. 56.

Fowler v. *Osgood* (C. C. A. 8th Cir.) 141 Fed. 23.

Many other cases, both Federal and State, might be cited.

Foreign means *belonging to,* or *derived from another country or nation.* Obviously, a foreign court is a court created by another sovereign—for instance, one that derives its authority from a State different from that which created the court that appointed a receiver.

Federal Courts are wholly independent of State Courts. Although the Federal government and the several states exist within the same territorial limits, each is supreme within its own sphere. No state can enlarge or restrict the jurisdiction of a Federal Court. State Courts and Federal Courts are created by different sovereigns, by which alone they are maintained. No State Court can direct what a Federal Court shall or shall not do.

The fact that in this case both the State Court and the Federal Court sit in Ohio is, therefore, irrelevant and immaterial. The court that appointed Grant receiver was created by the Constitution and laws of the State of Ohio, whereas the court wherein the receiver brought suit, was created by laws enacted by Congress pursuant to the Federal Constitution. Their jurisdiction is different; the geographical territory in which they function is by no means identical; the tenure, qualifications and salaries of their judges are different; their judgments are reviewable by different courts, etc., etc. Each jurisdiction is foreign to the other to the same extent that each state is foreign to every other state.

That mere geographical location is irrelevant may be easily demonstrated. Can it be doubted that the Circuit Court of Appeals for the Sixth Judicial Circuit is a foreign jurisdiction to the Supreme Court of the State of Ohio? And yet both courts sit within the State of Ohio.

Of necessity a court must sit somewhere. But where it sits is unimportant. The Supreme Court of the United States sits only at Washington, D. C., but has jurisdiction of certain cases from the different Federal Districts, Alaska, the Philippines, Porto Rico, etc., etc. The decrees of no court operate throughout all space. This is true because there exist numerous independent sovereign

states or nations. The territory within which the decrees of a given court are effective never exceeds the territorial limits of the sovereign. As a rule the territorial jurisdiction of a given court is only a small portion of the territory governed by a sovereign. Consequently a jurisdiction is *foreign* to another jurisdiction, *whenever it exists under a different sovereign,* as in the case of any State Court in relation to a court created by another state (Illinois, Ohio, Texas, etc.), or *whenever its territorial jurisdiction is separate and distinct from that of the other,* as is the case of the different (federal) District Courts, even though they are created by the same sovereign, are members of the same judicial circuit and may sit within the same state.

As a rule the *territorial* jurisdiction of courts created by different sovereigns is separate and distinct. Supreme political power in a given territory usually means a triumphant victor over vanquished foes. Sovereignty is jealous of its prerogatives and does not brook on its own territory the presence of a rival. That is why, as a rule, wherever courts are created by different sovereigns, the territorial jurisdiction of each is separate and distinct.

But there may be a composition. Separate and distinct *territorial* jurisdiction is not essential to constitute one court foreign to another. For instance, the various courts imposed by Great Britain, the United States, France, Germany and other powers acting in concert upon China, Turkey and other nations. Is there any doubt that such international courts are *foreign* to the local courts?

If courts of different sovereigns sit within the same territory—if they are created and maintained under

laws that emanate from different sources—then they are as foreign to each other as are the courts of California and New York. Our dual form of government resulted from a composition. The sovereign states surrendered a portion of their powers. There was created and established another sovereign which is as distinct from and independent of the several states as any one of them is separate and distinct from and independent of any other. As heretofore stated, although the Federal government and the several states exist within the same territorial limits each is supreme within its own sphere. And those spheres in political and legal theory are as separate and distinct as if the territorial jurisdictions of these separate and independent sovereigns were separated by oceans. And the same is true of their respective courts.

The true rule is, that whenever a receiver brings suit either outside the territorial jurisdiction of the court that appointed him, or in a court that derives its authority from a source different from that of the court that appointed him, he sues in a *foreign* jurisdiction. This is true either because the sovereign that created the appointing court has limited the powers of such court, or because the court in which the receiver sues is independent of the sovereign that created the appointing court.

As said by the Supreme Court of the United States, the court in which the receiver sues is entitled to determine who shall be receiver, what shall be done with the funds collected, etc., etc. The receiver owes obedience to the court that appoints him. He cannot serve two masters. And where he is not vested with title to the assets of a corporation, direction to sue in an independent court confers no *authority* to sue. It is generally said that the receiver's authority is only co-extensive with that of the *court* appointing him, and that it cannot be

asserted beyond the territorial jurisdiction of such *court*. When the receiver in the case at bar sued in the District Court, he was *in* such court. He was in a *foreign jurisdiction. What authority has the Court of Common Pleas of Mahoning County in the District Court of the United States for the Northern District of Ohio?* And in the absence of *title to the assets* of The Struthers Furnace Company what standing or right of action has such receiver in the latter court?

It was created by a different sovereign; and when Grant entered that court he was in a foreign jurisdiction, as effectively as if he had entered the State of Indiana. The jurisdiction of the State Court ended where the jurisdiction of the Federal Court began.

The fact that both courts sit in Ohio is immaterial. Grant was merely an officer of the court that appointed him. Unquestionably, he sued in another jurisdiction—in a court that derived no authority whatever from the constitution or laws of the State of Ohio. And the reasons for the rule announced by the Supreme Court are equally applicable, regardless of whether the two courts sit in the same state.

The Federal Court in which Grant sued had the right and power to determine for itself who the receiver should be.

Such court had the right and power to control the funds realized within its own jurisdiction.

And any sums recovered in such court would necessarily have to be turned over to the receiver to be by him administered under the court appointing him.

The rule declared by the Supreme Court has not only

its origin, but its reason and justification in a *conflict of jurisdiction between distinct and independent courts.* A receiver who has no title may not sue in a foreign jurisdiction, not because he has crossed some geographical line, or is without the territorial jurisdiction of the court that appointed him, *but because he must seek the aid of a distinct and independent court that has not only the power but the duty to determine for itself who shall be appointed receiver, what shall be done with the property or funds realized, etc., etc.* Jurisdiction is refused, not because the receiver has no power outside the territorial jurisdiction of the court that appointed him, *for he may make contracts, accept payment of moneys due the estate, discharge an indebtedness of the estate, etc., etc., outside of such territorial jurisdiction.* Moreover, he is usually directed and authorized by the court that appointed him to sue in a foreign jurisdiction. The foreign court, however, *for reasons of policy,* refuses to permit the receiver to *exercise* the power granted by the appointing court. And of course the latter has no way of coercing the former. It is purely a case of *conflict of jurisdiction.* And that conflict exists in the case at bar to the same extent that it would exist if Grant had been appointed receiver by some court in Alabama or Wyoming.

Of course no such considerations apply where a receiver has *title.* In that case he sues not as an officer of the appointing court, but as of right by virtue of his title. Even this power is a creature of comity among nations. In the United States, however, it is a power protected by the Federal Constitution, where plaintiff is a citizen of one of the United States.

For the foregoing reasons we respectfully submit that the petition herein should be denied.

It is with considerable trepidation that we omit from our answer a brief discussion of the merits, particularly in view of the opinion that was rendered by the District Court, to which, of course, the petitioner has called attention. Why should the writ issue if in no event Grant, as receiver, could recover? . . .

As an antidote to the District Court's opinion which, we respectfully submit, is supported by neither the record nor the law, we have included in the appendix the merest outline of the essential facts and a few of the legal propositions upon which we relied in the courts below.

Respectfully submitted,

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APPENDIX.

(Taken from supplemental brief filed by counsel for Petitioner in Circuit Court of Appeals. The index consisted of only one page of which the following is a facsimile.)

INDEX.

Statement 1

Argument:

I. The Receiver was Clothed With Authority to Bring this Suit and the Suit Itself is Rightly Based Upon the Pleadings in the Original Action in Connection With the Controlling Statutes of the State of Ohio, and Equitable Principles, and Such Authority is Rightly Incidental to and Consistent With the Nature and Purposes of His Possession of the Property and Assets of the Corporation, Which Passed to the Receiver 5

I A. The Powers of the Receiver Under the Court's Order and the Authority of the Court to Make the Order to Pursue Leach and Company for the Recovery of the Bonds Secured by the Mortgage or for Re-imbursement for Bonds Already Disposed of by Leach and Company is Clearly Germaine to and Absolutely Necessary to the Determination of the Question of the Amount of Outstanding Bonds of this Company secured by Mortgage or in the Event of Their Previous Transfer to Bona Fide Purchasers to the Recovery and Payment to the Bondholders and, or, Creditors, and, or, Stockholders of the Corporation of the Equivalent of said Bonds in Money 17

SEC. 11894. "APPOINTMENT OF RECEIVER. A receiver may be appointed by the supreme court or a judge thereof, the court of appeals, or a judge thereof in his district, the common pleas court or a judge thereof in his district, the common pleas court or a judge thereof in his district, or the probate court, in causes pending in such courts respectively, in the following cases:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed or materially injured;

2. In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

5. In the cases provided in this title, and by special statutes when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In All other cases in which receivers heretofore have been appointed by the usages of equity."

SEC. 9064. "RECEIVER. When a line of railroad, the whole or part of which lies within this state, by

order of court, has been placed in the hands of a receiver, who has taken charge of and is operating it for the purpose of carrying passengers, freight, and doing such other things as ordinarily belong to the running and management of railroads, in his official capacity, such receiver may sue or be sued in the courts of this state without leave previously granted. No person shall act as such receiver unless he is a resident citizen of this state."

THE FACTS.

The proof shows that a bond issue was necessary (Defendant's Ex. "C", Tr. 127, 113, 29-30; Plaintiff's Ex. 14-A, Tr. 147-8). There was no evidence whatever of conspiracy. Leach & Company was approached twice by the president of The Struthers Furnace Company before an agreement for the sale of the bonds was reached (Tr. 82-4, 87-8, 135, 160-1, 177, 190-1, 193, 197). The written contract expressly provided that the bonds should be paid for in cash *and* preferred stock (Tr. 24-6).

Pursuant to the contract the properties of The Struthers Furnace Company were appraised by independent experts (Tr. 133-199, 90-4, 88-9, 181-5, 177-8, 94-7, 54-5, 173-5, 187-8). Leach & Company in reliance upon the appraisals, independent audits, and other data furnished by The Struthers Furnace Company exercised its option to take all the bonds. The preferred stock that was turned in at $85 a share then had a market value of $87.50 a share (Tr. 199-2). In addition to the 3,000 shares of preferred stock Leach & Company paid The Struthers Furnace Company $1,122,250 in cash.

As a result of the financing the current indebtedness of the company was funded, and as of December 31, 1921, it had a surplus of more than $1,000,000. (Tr. 187, 173-5.)

The bond issue was approved by both stockholders and directors (Tr. 61, 57-66, 67-75, 63, 73, 146-9, 69, 159, 148-9).

All legal matters were in charge of Messrs. Tolles, Hogsett, Ginn & Morley (Tr. 56-159, 71-198, 812).

The Struthers Furnace Company paid interest on all outstanding bonds until and including May 1, 1924, (Tr. 138).

More than three years after the transaction complained of, the receiver brought this anomalous suit. He tendered back to Leach & Company *not* the 3,000 shares of stock and the $1,122,250 in cash, but merely the stock!

Statute permitting corporations to redeem preferred stock:

"AN ACT

To amend section 8669 of the General Code, relating to common and preferred stock of private corporations.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 8669 of the General Code be amended to read as follows:

SEC. 8669. A corporation issuing both common and preferred stock may create designations, preferences, and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof.

Preferred stock may also be redeemed in whole or part by purchase thereof by the corporation or by exchanging the same for common stock, or be con-

verted into common stock, upon such terms as from time to time may be proposed by the board of directors and accepted by the holders thereof. Preferred stock redeemed may be cancelled by the board of directors, and if so cancelled shall not be reissued. A certificate of such cancellation shall be filed with the secretary of state, as a certificate of reduction. Thereupon the authorized capital stock of such corporation shall be reduced by the amount stated in said certificate.

SECTION 2. That said original section 8669 be, and the same is hereby repealed." (107 Laws of Ohio, p. 411).

Only the second paragraph was new. The first paragraph (re-enacted) had been the law for several years.

I.

The Act of March 21, 1917, as amended, confers upon corporations issuing both common and preferred stock, in addition to their CONTRACTUAL rights to redeem, at a fixed time and price, preferred stock issued by them, the general STATUTORY POWER to purchase said preferred stock from such persons at such times and at such prices as they may be able so to do.

Such stock so purchased may be held by such corporations, and, like bonds, issued again.

II.

The general **STATUTORY POWER** conferred by the Act of March 21, 1917, upon corporations issuing both common and preferred stock to purchase preferred stock issued by them enters into and forms a part of the charters of all such corporations, whether copied into their certificates of incorporation or not.

It also enters into and forms a part of the contract between holders of preferred stock certificates and such corporations.

Stated in another way, this general **STATUTORY** power conferred by the new matter contained in section 8669 as amended is **IN ADDITION TO** the special **CONTRACTUAL** rights of such corporations authorized by the re-enacted original section 8668. All persons contracting with corporations are conclusively presumed to have knowledge of their powers. Therefore, it necessarily follows that the special **CONTRACTUAL** rights of corporations to redeem their preferred stock at the fixed times and prices expressed in said stock certificates **ARE SUBJECT TO THE EXERCISE BY SUCH CORPORATIONS OF THE GENERAL STATUTORY POWER** to purchase said stock at such times and prices as they may be able so to do. This, for the reason that such general Statutory power enters into and forms a part of the contract between such corporations and all holders of preferred stock.

III.

Only by means of an unequivocal provision **EXPRESSLY EXCLUDING** the **STATUTORY** power of a corporation to reedem its preferred stock by purchase can such Statutory power be prevented from entering into and becoming a part of the contract between such corporations and the holders of its preferred stock.

Neither the resolutions authorizing said preferred stock, nor the stock certificates of The Struthers Furnace Company, contain any such provision, express or implied. They express and were intended to express only the **CONTRACTUAL** rights of the parties pursuant to the first paragraph of the Act of March 21, 1917, in contradistinction to the **STATUTORY POWER** of said corporation conferred by the second paragraph of said Act, which, as heretofore shown, entered into and formed a part of, not only the charter of said corporation, but its contract with holders of preferred stock.

IV.

Even in the absence of the express power conferred by the Act of March 21, 1917, to purchase its preferred stock, The Struthers Furnace Company had the implied power to accept the 3,000 shares of preferred stock in controversy, pursuant to the contract of April 15, 1922, for the following reasons:

(a) They were received in good faith at less than their market value and at $20 a share less than the redemption price fixed in said stock certificates, not for the purpose of favoring Leach & Company, nor for the purpose of trafficking in its shares, but for the sole purpose of thereby avoiding great and possibly irreparable loss.

(b) There was no purchase of said shares. They were received as a mere incident to the exercise of the inherent, as well as the statutory power to borrow money, to issue its notes and bonds therefor and to secure payment of the same by mortgage. Having such powers, The Struthers Furnace Company had the power to agree upon the consideration to be paid for said bonds. And the said preferred stock was received by it merely as a part of the purchase price of said bonds.

As held by the Supreme Court of Ohio,

> "Acts of a corporation which, if standing alone, or engaged in as a business, would be beyond its implied powers, are not necessarily ultra vires when they are incidental to, or form a part of, an entire transaction, that, in its general scope, is within the corporate purpose. The validity of such a transaction is to be determined from its general character considered as a whole, rather than by segregation into individual parts, and each regarded as distinct from the others."

This would also be true, even if there were a purchase of said bonds under the circumstances above stated.

(c) Unlike some other States, the State of Ohio has placed no restriction upon the price at which bonds of private corporations may be sold, although it has provided that railroad bonds shall not be sold at less than 75 per cent of their par value.

A sale of the $1,500,000 issue of bonds by The Struthers Furnace Company for only the $1,122,250 cash paid by Leach & Company would have been invulnerable to attack. The mere fact that Leach & Company also transferred 3,000 shares of preferred stock to The Struthers Furnace Company, of necessity could not and did not invalidate the transaction.

V.

Aside from the considerations mentioned in Point IV, the court below was clearly wrong in holding that a portion of the bonds delivered to Leach & Company, pursuant to the contract of April 15, 1922, were unsupported by any consideration other than the 3,000 shares of preferred stock.

Even if the court below were right in so holding, the conclusions of law which he sought to deduce therefrom would by no means follow.

VI.

Even if it be assumed that the contract of April 15, 1922, was ultra vires The Struthers Furnace Company, it is too plain for argument that said **COMPANY** is not entitled to rescind said contract or to obtain any other relief for the following reasons:

1. The contract has been completely performed by both parties.
2. The parties are in pari delicto.
3. The status quo ante cannot be restored; and it would be grossly inequitable to permit said company to keep the $1,122,250 in cash and tender back merely the preferred stock.
4. Leach & Company never agreed to pay **ALL** cash for the bonds. No new or better contract can now be made for said company.
5. The said company is estopped to assert that said contract is ultra vires.
6. The said company is guilty of laches.

And for equally valid reasons neither the **STOCKHOLDERS**, nor the **CREDITORS**, if any, nor the **BONDHOLDERS**, are in any better position.

VII.

A court of equity will not permit Leach & Company to be mulcted of $312,375.00 for the benefit of the other persons who participated in the transaction complained of.

Old Dominion Copper Mining and Smelting Co. v. *Lewisohn*, 210 U. S., 206.

Hanlon Millinery Co. v. *Mississippi Valley Trust Co.* (Mo.), 158 S. W., 359.

Advance Realty Co. v. *Nichols* (Minn.) 148 N. W., 65.

Little v. *Garabrant*, 35 N. Y. S., 689.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 479

HUGH W. GRANT, Receiver of the Struthers Furnace Company,
Petitioner,

vs.

A. B. LEACH & CO., INC.,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF.

WILLIAM L. DAY,
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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 479

HUGH W. GRANT, Receiver of the Struthers Furnace Company,
Petitioner,

vs.

A. B. LEACH & CO., INC.,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF.

MAY IT PLEASE THE COURT:

The respondent wishes to supplement the brief that was filed by it in opposition to the petition for a writ of certiorari.

The present brief will be addressed to certain phases of the law of Collateral Attack. In it we shall endeavor to demonstrate that the Circuit Court of Appeals correctly held that the Court of Common Pleas of Mahoning County did not and could not confer upon Grant, as receiver, power to maintain the suit that was subsequently instituted by him against A. B. Leach & Co., Inc.

The propositions and authorities upon which we rely are as follows:

POINTS AND AUTHORITIES.

I.

Petitioner is estopped to assert here that the Circuit Court of Appeals was without jurisdiction to determine whether the Court of Common Pleas had conferred or could confer upon Grant power to sue Leach & Co.

Jones Company v. *Munger Improved Cotton Mach. Mfg. Co.* (C. C. A. 5th Cir.) 50 Fed. 785.

Bloomfield R. Co. v. *Grace,* 112 Ind. 128, 13 N. E. 680.

Biggs v. *Commercial Mutual Ins. Co.* 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684.

II.

The Court of Common Pleas neither conferred nor could confer authority upon Grant to sue Leach & Co. for the following reasons:

1. **The petition to foreclose plainly shows that the mortgage did not cover the alleged claim against Leach & Co. It is true that petitioner prayed that a receiver be appointed for all the property of The Struthers Furnace Co., but this prayer was no part of petitioner's cause of action, and could not authorize any relief not warranted by the facts pleaded.**

2. **"Jurisdiction" means the power to hear and determine an issue presented by the pleadings.**

3. **The order appointing Grant receiver for property not covered by the mortgage, viz., the alleged claim against Leach & Co., and the order directing that suit be brought on said claim were not responsive to the pleadings. Consequently both orders were void.**

That the prayer is no part of the cause of action and

cannot authorize relief not warranted by the facts pleaded, see:

Glass Co. v. *Stoehr,* 54 O. S. 157.
Culver v. *Rodgers,* 33 O. S. 537.
21 Corpus Juris, p. 679.
31 Cyc. p. 110.

With respect to the purpose and scope of foreclosure proceedings, see the following:

Gennes v. *Peterson* (Ore.) 103 Pac. 515.
19 Ruling Case Law, pp. 525, 536.

That an order appointing a receiver for property not covered by the mortgage is void, see:

Staples v. *May,* (Cal.) 25 Pac. 346, 348.
Alabama Nat. Bank v. *Mary Lee Coal & Railway Co.,* (Ala.) 19 So. 404.
St. Louis, A. T. R. Co. v. *Whitaker,* (Tex.) 55 S. W. 448, 451.
Central Trust Co. v. *Worcester Cycle Mfg. Co.,* 114 Fed. 659.
State of Florida v. *Jacksonville, P. & M. R. Co.,* 15 Fla. 201, 280-2.

In view of the pleadings, the order directing Grant to take possession of all the property of The Struthers Furnace Co. should be construed so as to exclude property not covered by the mortgage.

Authorities, *supra.*

Since the petition in foreclosure did not show that there were any creditors other than bondholders, and the suit was merely one to foreclose a mortgage, the order directing the receiver to sue Leach & Co. was void.

Tyler v. *Hamilton,* 62 Fed. 187, 189.

It was not necessary that a separate suit be instituted against Leach & Co. since after decree of foreclosure, the bonds would have to be presented for cancellation and any person presenting a bond would be compelled to prove his title thereto.

Dickerman v. *Northern Trust Co.*, 176 U. S. 181, 194.

If, on the other hand, all these negotiable bonds were in the hands of innocent persons for value, then, of course, they would have to be paid. Not until such payment, would the damage to the mortgagor from the hypostatized wrongful act of Leach & Co. be ascertained. The prosecution of any such claim, however, would not be the function of a mere receiver appointed in foreclosure proceedings. It would be incumbent upon the corporation, stockholders, or other persons damaged by reason of any wrongful act of Leach & Co. to bring suit, if so advised.

The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a Court or other tribunal to render a judgment affecting individual rights is always open to inquiry when the judgment is relied upon in any other proceeding.

Kilbourn v. *Thompson*, 103 U. S. 168, 197-8.

This is particularly true with respect to persons who are not parties or privies to the judgment attacked.

15 Ruling Case Law, p. 841.

"Jurisdiction" is the power to hear and determine an issue presented by the pleadings.

Sache v. *Gillette*, (Minn.) 112 N. W. 386, 11 L. R. A. (N. S.) 803, 807.

Reynolds v. *Stockton*, 140 U. S. 254.

Spoors v. *Coen*, 44 Ohio St. 497, 9 N. E. 132.
Charles v. *White*, (Mo.) 112 S. W. 545, 21 L. R. A. (N. S.) 481.
Seamster v. *Blackstock*, (Va.) 2 S. E. 36.
Banking House of Castetter v. *Dukes*, (Nebr.) 97 N. W. 805.

Under the foregoing Authorities, the orders entered by the Court of Common Pleas are void because they were not responsive to the pleadings.

III.

In appointing Grant receiver, the Court of Common Pleas transcended the power conferred upon it by Statute and its order was void, not only with respect to the property not covered by the mortgage, but with respect to all other property of the mortgagor.

Section 11894 of the Ohio Code defines the jurisdiction of the Court of Common Pleas to appoint receivers. The said Court has power to appoint a receiver in an action by a mortgagee for the foreclosure of his mortgage only when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or when a condition of the mortgage has not been performed *and* the mortgaged property is probably insufficient to discharge the mortgage debt. This power, however, extends only to the mortgaged property.

The petition in the foreclosure proceedings contained no allegations which brought the case within Section 11894 of the Ohio Code; consequently, the Court of Common Pleas in appointing Grant receiver, transcended the power conferred upon it by Statute with the result that the said order was absolutely void.

Jurisdiction to appoint a receiver cannot be conferred

upon the Court by means of a mere private agreement between the parties to a mortgage.

Baker v. *Varney,* (Cal.) 62 Pac. 100.
Couper v. *Shirley,* (C. C. A. 9th Cir.) 75 Fed. 168.
Jarvis v. *McQuaide,* 53 N. Y. S. 97.
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Windsor v. *McVeigh,* 93 U. S. 274.
Bigelow v. *Forrest,* 9 Wall. 339.
U. S. v. *Walker,* 109 U. S. 258.
Wilcox v. *Jackson,* 13 Pet. 498, 511.
Hatch v. *Ferguson,* (C. C. A. 9th Cir.) 68 Fed. 43.

The order is also void, because, contrary to Sections 11279 and 11283 of the Ohio Code and the decisions of the Supreme Court of Ohio, Grant was appointed receiver without notice.

Railway Co. Jewett, 37 Ohio St. 649.
Ober v. *Excelsior Plainting & Mfg. Co.,* (La.) 10 So. 792.

ARGUMENT.

I.

The petitioner is estopped to assert here that the Circuit Court of Appeals was without jurisdiction to determine whether the Court of Common Pleas had conferred or could confer upon Grant power to sue Leach & Co.

In the District Court Leach & Co. denied the authority of Grant as receiver to maintain his suit.[1] Grant offered no evidence concerning his authority in the premises. On appeal Leach & Co. assigned as error and argued in the Circuit Court of Appeals that the District Court had erred in not holding that Grant, as receiver, had no authority to institute or maintain said suit. (Tr. 218.) The Circuit Court of Appeals intimated that the absence of proof of authority to sue would necessitate a reversal so that "either party might correct this omission in the proofs." (Tr. 266.)

The Court suggested that the parties consider whether their rights could be preserved by means of a stipulation that there should be filed in the Circuit Court of Appeals certified copies of the order appointing Grant receiver, the petition on which said order was based, and the order authorizing the institution of the suit against Leach & Co., if any.

The Court informed counsel that if such a stipulation should be made and the documents filed the Court would hear further oral arguments and consider any additional briefs that might be filed. Counsel were also informed that:

> "The further argument desired will be devoted to the question whether authority was *or could be*

1. Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 8-9.

conferred upon the receiver, and be rightly based upon the pleadings, in connection with the controlling statutes and equitable principles, and whether such authority would or would not be rightly incidental to and consistent with the nature and purposes of his possession of those assets which passed to the receiver." (Tr. 267.)

Pursuant to the Court's suggestion the stipulation and the documents mentioned on pp. 15-16 of our former brief were filed for the consideration of the Circuit Court of Appeals, as well as briefs by both parties, addressed to the questions above stated. The aforesaid questions were also argued orally by counsel for each party. Neither party objected to the procedure suggested by the Circuit Court of Appeals, nor questioned its jurisdiction in the premises. In other words, both parties consented that upon the documents filed pursuant to stipulation the said Court might determine whether the Court of Common Pleas *had* conferred or *could confer* upon Grant, as receiver, authority to maintain the suit in question.

If petitioner had any objections to the determination of the aforesaid questions by the Circuit Court of Appeals he should have specified them and have refused to sign the stipulation. He might even have qualified his assent. But what did he do? Without making any objections, he signed the stipulation, and filed a brief addressed to the two questions which the Court had said that it would determine. Of course, the Court and the respondent assumed that petitioner did not question the jurisdiction of the Court in the premises.

What the Court did it did as a matter of grace to the petitioner. It was a summary proceeding by the consent of the parties to save time and expense. The Court

had jurisdiction of the subject-matter and of the parties, both of whom plainly consented that the Court might determine the two questions above stated.

Leach & Co.'s appeal and the appearance of the appellee in the Circuit Court of Appeals had vested the said court with jurisdiction of the subject-matter and the parties. The assignment of error that the District Court had erred in not holding that appellee had no authority to maintain said suit was based upon an issue that had been presented to the District Court (Tr. 19) and decided adversely to appellant (see second sentence District Court's opinion, Trans., 202.) It is not a case where the parties attempted by stipulation to confer jurisdiction of *subject-matter* upon a Federal Court. The Circuit Court of Appeals had jurisdiction of the subject-matter and the parties, who merely stipulated that in determining a question previously presented to it for decision the Court might consider certified copies of the record made in the Court of Common Pleas, which Grant, as receiver, for some reason had failed to offer in evidence. Such stipulations are by no means unusual; and of course the courts uniformly hold that they estop the parties thereto from thereafter repudiating them.

Jones Company v. *Munger Improved Cotton Mach. Mfg. Co.* (C. C. A. 5th Cir.) 50 Fed. 785.

Bloomfield R. Co. v. *Grace,* 112 Ind. 128, 13 N. E. 680.

Riggs v. *Commercial Mutual Ins. Co.* 125 N. Y. 7, 10 L. R. A. 684.

Petitioner's present attack upon the jurisdiction of the Circuit Court of Appeals is as untenable as it is belated. This attack is predicated upon Leach & Co.'s ad-

mission in the amended answer that Grant was the duly appointed and qualified receiver of all the property and assets of the Struthers Furnace Company.

But this admission was made long prior to the stipulation that was filed in the Circuit Court of Appeals. Necessarily, the record theretofore made in the District Court—whether by proof or failure to prove, or by pleading or failure to plead—was modified by the stipulation, the documents filed and the consent that the Court might determine the two questions above stated.

Moreover, in its amended answer Leach & Co. denied the allegations in plaintiff'spetition that the Court of Common Pleas had authorized him to sue. The issue thereby raised was not limited to whether the Court of Common Pleas had actually entered an order directing Grant, as receiver, to sue. It necessarily challenged the validity of any such order. This is true because if the order was void it conferred no authority.

It might be contended that Grant's authority to sue turns upon whether he was appointed a receiver for all the property of The Struthers Furnace Company, and that since Leach & Co. admitted in its answer that Grant had been so appointed, the Circuit Court of Appeals was bound to hold that Grant had authority to sue. Such a contention would be untenable for the following reasons:

1. If every receiver of property had by virtue of his appointment authority to sue, then it might be said that an admission that one had been appointed receiver was an admission that he had authority to sue. But under the Ohio Code a receiver cannot sue unless he is expressly so authorized by the Court that appointed him (See authorities cited on pp. 12-14 of our former brief). It follows, therefore, that an admission that one has been appointed

receiver is not an admission that one has authority to sue.

2. The denials as well as the admissions contained in an answer must be considered. In the case at bar Leach & Co. denied that Grant had authority to sue.

3. In the Circuit Court of Appeals Grant expressly agreed that in determining whether he had authority to sue the Court might consider certain specified documents. Necessarily, the legal effect of those documents was for the Court; and the stipulation modified the record made in the District Court, whether by pleading or proof.

4. Grant also stipulated that the said Court might determine whether the Court of Common Pleas *could* authorize him to sue. When Grant stipulated that the Circuit Court of Appeals might consider certain documents and determine whether the Court of Common Pleas either *had conferred* or *could* confer authority upon him to sue, he necessarily consented that the validity of all orders entered by the Court of Common Pleas might be determined by the Circuit Court of Appeals. If the authority to sue rests upon the order appointing Grant receiver, the Circuit Court of Appeals could determine the validity of said order notwithstanding Leach & Co.'s prior admission that Grant had been appointed receiver.

In view of Leach & Co.'s denial that Grant had authority to sue, and the proceedings had in the Circuit Court of Appeals, petitioner is estopped to say here for the first time that the Circuit Court of Appeals had no jurisdiction to determine whether the Court of Common Pleas had conferred or *could* confer authority upon Grant, as receiver, to sue Leach & Co. This is particularly true in view of section 391 of the Judicial Code, which is set forth on p. 16 of our former brief.

II.

The Court of Common Pleas neither conferred nor could confer authority upon Grant to sue Leach & Co. for the following reasons:

1. **The petition to foreclose plainly shows that the mortgage did not cover the alleged claim against Leach & Co. It is true that petitioner prayed that a receiver be appointed for all the property of The Struthers Furnace Co., but this prayer was no part of petitioner's cause of action, and could not authorize any relief not warranted by the facts pleaded.**
2. **"Jurisdiction" means the power to hear and determine an issue presented by the pleadings.**
3. **The order appointing Grant receiver for property not covered by the mortgage, viz., the alleged claim against Leach & Co., and the order directing that suit be brought on said claim were not responsive to the pleadings. Consequently both orders were void.**

The jurisdiction of the Court of Common Pleas must rest upon the foreclosure proceedings. As demonstrated in our former brief a suit by a stockholder solely for the appointment of a receiver is unknown to the law (pp. 19-26). Accordingly, let us analyse the petition that was filed by the Guardian Savings and Trust Company against The Struthers Furnace Company for the foreclosure of a mortgage.

This petition contains two alleged causes of action. Plaintiff alleged as its first cause of action the following facts:

FIRST CAUSE OF ACTION.

That on or about May 1, 1922, the defendant duly authorized an issue of bonds in an amount not to exceed $1,500,000.00, payable to bearer with interest at the rate of 8% per annum, and due on May 1, 1942.

That on or about May 18, 1922, the defendant, being thereunto duly authorized by its Board of Directors and stockholders, delivered to plaintiff as trustee its first mortgage trust deed dated as of May 1, 1922 to secure the payment of the principal and interest of said bonds, etc.

That thereafter all the bonds were duly issued for a valuable consideration in accordance with the terms of said mortgage; that all the bonds were then outstanding in the hands of various persons and corporations, who were the owners and holders thereof for value, and that said bonds were in all respects valid and outstanding obligations of the defendant.

That defendant had defaulted in the payment of the semi-annual installment of interest due on all the said bonds on November 1, 1924, and that the trustee had pursuant to the terms of the mortgage declared the principal of all outstanding bonds due and payable, and had made demand therefor on defendant (Tr. 237-9).

SECOND CAUSE OF ACTION.

All the averments of the first cause of action were adopted by reference.

The plaintiff also averred that to secure the payment of principal and interest certain property had been conveyed to it as trustee by the defendant. The property is then described (Tr. 240-5). Plaintiff alleged that the mortgage contained the following provision:

> "There is not included hereunder any corporate stocks owned by the Company nor any mined ore, coal, coke, supplies, manufactured iron, cash accounts, bills receivable or current assets, all being expressly excluded herefrom." (Tr. 245).

And of course, the alleged claim of The Struthers Furnace Company against Leach & Co. subsequently asserted by Grant as receiver, was not expressly included in said mortgage, neither are there any general provisions under which said claim may be subsumed. This is not to be wondered at because Leach & Co. purchased all the bonds for purpose of resale, pursuant to a contract that ante-dated the trust deed and the resolutions authorizing it (Tr. 12). The contract would never have been executed if either party had thought that it was *ultra vires*. And it is absurd to say that the parties intended that the mortgage should cover a claim by the mortgagor against Leach & Co. arising out of the very contract pursuant to which the bonds were authorized, issued and sold.

Plaintiff also alleged that the mortgage provided that in case of default the trustee should proceed in equity or at law and that pending any action or suit the trustee should be entitled to the appointment of a

> "receiver of the *trust estate,* and of the tolls, earnings, revenues, rents, issues, profits and incomes *thereof.*" (Tr. 246).

Also that in the mortgage the defendant had agreed that in case of default it would waive the issue and service of process; that it would enter a voluntary appearance in any action or suit that might be instituted by the trustee and consent to the entry of a judgment

> "for the recovery and possession of *the trust estate* and of the tolls, earnings, revenues, rents, issues, profits and income *thereof.*" (Tr. 246).

Also that the mortgage had been duly recorded; that default had occurred, etc.

Plaintiff prayed:

> (1) That it have judgment for $1,560,000, being the principal amount and interest due on November 1, 1924, together with interest, etc.,

(2) That said mortgage be declared a valid lien upon the "property therein and herein described."

(3) That "the property described in said mortgage" be sold and applied to the payment of costs and expenses of said sale, expenses and reasonable compensation of trustee and its attorneys and amount due on bonds;

(4) For a deficiency judgment, if necessary;

(5) That a receiver be appointed to take charge of "the property of the defendant to manage, control and conduct the same and collect the rents, earnings, issues, profits and incomes therefrom;"

(6) "That the Court order the defendant or any receiver appointed to take charge of the defendant's property to hold, set apart and sequester any and all amounts received as rents, earnings, issues, profits or incomes by the defendant or any said receiver, from or upon *any of the property described herein,* for the payment of the amount due upon said bonds * * * *" and for general relief. (Tr. 248-9.)

The following facts are significant:

1. The trust deed provided that in case of default a receiver might be appointed for the *trust estate,* which by no means constituted all the property and assets of the mortgagor.

2. Plaintiff did not aver that the mortgagor was insolvent; or that there were any creditors, either judgment or simple-contract, other than bondholders; or that the mortgagor was financially irresponsible; or that the mortgaged property was probably insufficient to discharge the mortgage debt; or that the mortgaged property was in danger of being lost, removed or materially injured, or any other facts which in law justified the appointment of a receiver for any of the property of the defendant, much less for all its property.

Let us assume for the purposes of argument that the provision in the trust deed that a receiver might be appointed for the *mortgaged property* in case of default would justify the appointment of a receiver for the aforesaid mortgaged property, despite Section 11894 of the Ohio Code. No facts were averred which would justify the appointment of a receiver for property not covered by the trust deed.

It is true that the plaintiff prayed that a receiver be appointed for "the property of the defendant." But the prayer is no part of the cause of action. It is merely a request for certain relief. It is no part of the issues to be tried.

Glass Co. v. *Stoehr*, 54 O. S. 157.
Culver v. *Rodgers*, 33 O. S. 537.

In

21 Corpus Juris, p. 679

it is said:

> "The prayers may be considered to elucidate the allegations of the bill, but cannot authorize relief not warranted by the case made by such allegations."

The same is true of pleading under the codes. In

31 Cyc. p. 110

it is said:

> "The prayer for relief forms no part of the statement of the cause of action; and it is unimportant unless there is ambiguity of statement. * * * The facts alleged, and not the relief demanded, are of chief importance, and they determine the relief to be granted."

That plaintiff prayed for the appointment of a receiver for "the property of the defendant" is unimpor-

tant. The point is, that no facts were pleaded which would justify the appointment of a receiver for any property not covered by the trust deed. And whether a receiver should be appointed for property not covered by the trust deed was not an issue to be tried. The appointment of a receiver for such property would not be responsive to the pleadings, or within the scope of the foreclosure proceedings.

The purpose of foreclosure proceedings is to bar the mortgagor and those claiming under him.

Gennes v. *Peterson* (Ore.) 103 Pac. 515.

It is to determine the amount due to the mortgagee and to obtain a decree that will enable the mortgaged property to be sold and the proceeds to be applied to the satisfaction of the mortgage debt.

19 Ruling Case Law, § 327, p. 525.

General creditors and other persons having no judgment or other lien on the mortgaged property cannot intervene.

19 Ruling Case Law, p. 536.

It follows, therefore, that the claim asserted by Grant, as receiver, against Leach & Co., which grew out of the original contract for the purchase of all the bonds for re-sale to the general public, was in nowise involved in the foreclosure proceedings. The Court of Common Pleas was without jurisdiction to vest the receiver with title to said claim, or to direct that he bring suit on it against Leach & Co. In

42 Corpus Juris, § 1702, p. 127,

with reference to the power of the court to direct a re-

ceiver to take charge of property not covered by the mortgage, it is said:

> "He [the receiver] cannot be authorized to take charge of property not covered by the mortgage."

That the action of the Court, in appointing a receiver for property not covered by the mortgage was *void*, see, in addition to the cases cited on p. 28 of our former brief, the following:

Staples v. *May*, (Cal.) 25 Pac. 346, 348.

Alabama Nat. Bank v. *Mary Lee Coal & Railway Co.* (Ala.) 19 So. 404.

St. Louis, A. T. R. Co. v. *Whitaker*, (Tex.) 55 S. W. 448, 451.

Central Trust Co. v. *Worcester Cycle Mfg. Co.* 114 Fed. 659.

State of Florida v. *Jacksonville, P. & M. R. Co.*, 15 Fla. 201, 280-2.

At least, the order of the Court appointing Grant receiver must be construed so as to exclude property not covered by the mortgage.

Smith v. *McCullough*, 104 U. S. 25.

Central Trust Co. v. *Worcester Cycle Co.*, 659, 662.

And so far as the order directing Grant, as receiver, to sue Leach & Co. is concerned, the order was void. The record in the Court of Common Pleas does not show that there were any creditors other than bondholders. The plaintiff expressly alleged that all the bonds had been duly and regularly issued for value, and that the mortgage had been duly and regularly authorized by the Board of Directors and the stockholders of the mort-

gagor. The record does not show that the foregoing allegations were controverted by the mortgagor.

What interest had the receiver in the contract between Leach & Co. and the mortgagor, pursuant to which all the bonds had been issued and sold first to Leach & Co. for resale to the investing public?

In

Tyler v. *Hamilton*, 62 Fed. 187

where the receiver had filed a bill to contest the validity of certain leases executed after the mortgage, the Court held as stated in the following syllabus:

> "Leases of property of a corporation to a director, who held nearly all its stock, were assented to or ratified by the other directors, who held all the remaining stock. *Held*, that a receiver of the corporation, appointed in a suit to foreclose a mortgage of its property, could not contest the validity of the leases, he not representing creditors, and no circumstances being alleged vesting in him equities to maintain such a suit or to question the lessee's rights."

On p. 189 the Court (Judge Gilbert) said:

> "The receiver is in no attitude to contest the validity of those leases. He was a receiver appointed in the foreclosure suit to take charge of the mortgaged property pending the foreclosure. He is not shown to represent creditors, and no circumstances are alleged to exist which would vest in him equities to maintain this suit, or to question the rights of the defendants under the leases. A court of equity will, under certain circumstances, set aside a contract between a corporation and its directors, at the option of its stockholders, or at the suit of creditors. It may be said that, in general, the dealings of the directors with the corporation are viewed with suspicion. The director occupies a fiduciary relation to the stockholders whom he represents, and his contracts concerning the prop-

erty which is the subject of the trust are generally voidable at the instance of the party whose interest he represents. But such dealings are not absolutely prohibited, and they will be sustained if they are fair, and have been entered into in good faith, and no advantage has been taken of the fiduciary relation. *Oil Co.* v. *Marbury,* 91 U. S. 587-589; *Hotel Co.* v. *Wade,* 97 U. S. 13; *Stark* v. *Coffin,* 105 Mass. 328; *Buell* v. *Buckingham,* 16 Iowa, 284. In the case before the court the stockholders were all directors of the company, and they all assented to and ratified the leases. Hunt's relation to the other directors was not that of a trustee to *cestuis que trustent.* He sustained no fiduciary relation to them that they did not likewise sustain to him. In making the leases, he represented not the other stockholders, but himself; and they represented themselves, and not Hunt. They were not in the attitude of stockholders who had confided their interests to a board of directors, but they were themselves clothed with the power of directors, and were in a position each to protect his own interest. None of these stockholders is now here attacking the leases; neither does the corporation offer to rescind the same. No creditor of the corporation is here asserting his rights, and, if there were, no facts are shown upon which equitable relief to creditors might be predicated."

In the Court of Common Pleas it did not appear that there were any creditors other than bondholders. It did not appear that the mortgaged property was insufficient to pay the mortgaged debt, or that the mortgagor was insolvent. Leach & Co. was not a director but only a minority stockholder in The Struthers Furnace Company and in the foreclosure proceedings the plaintiff alleged that the mortgage had been duly authorized by the Board of Directors and the stockholders of The Struthers Furnace Co., and that all the bonds had been issued for value, etc. (p. 13, *supra*). Apparently a receiver was appointed without notice to defendant. At

any rate, the record does not show that the said defendant ever denied the allegations just referred to.

Neither did it appear whether Leach & Co. then held any of the bonds. If Leach & Co. held any bonds at that time, decree of foreclosure could be first entered and then when the bonds were brought into court for cancellation Leach & Co. would have to prove its title thereto.

Dickerman v. *Northern Trust Co.* 176 U. S. 181, 194.

If all the negotiable bonds were in the hands of innocent purchasers for value, then of course they would have to be paid. So long as there were no creditors other than bondholders; and the mortgaged property was sufficient to pay the mortgage debt; and the corporation was not complaining; and the transaction had been consummated years before, what authority could be given to this mere custodian of the mortgaged property to attack by means of an independent suit in a foregin jurisdiction and outside of Mahoning County the very contract pursuant to which all the bonds had been issued and sold?

But it may be said that this is a collateral attack on the order appointing Grant receiver of the claim against Leach & Co. and on the order directing him to sue Leach & Co; that the Court had jurisdiction of the foreclosure proceedings and general power to appoint a receiver in proper cases, and that consequently Leach & Co. cannot complain.

Such an assertion would be based upon a misapprehension of the law of Collateral Attack. We admit that this is a collateral attack on the orders in question;

but with respect to the Court of Common Pleas, we assert that it did not have *jurisdiction* to enter the aforesaid orders, and that hence they may be collaterally attacked, not only for the reasons heretofore assigned, but for those that will now be stated.

In

Kilbourn v. *Thompson,* 103 U. S. 168, 197-8,

this Court said:

> "The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding. See *Williamson* v. *Berry,* 8 How. 495; *Thompson* v. *Whitman,* 18 Wall. 457; *Knowles* v. *The Gas-Light & Coke Co.,* 19 id. 58; *Pennoyer* v. *Neff,* 95 U. S. 714."

This is particularly true in the circumstances presented by this case.

> "On the other hand it is generally held that where the rights of persons not parties or privies to a proceeding are adversely affected by the judgment rendered therein such persons are allowed to impeach it whenever it is attempted to be enforced against them, or whenever in any such case its validity is drawn in question, since they have no remedy against the judgment by appeal or otherwise in the case itself."
>
> 15 Ruling Case Law, p. 841.

Leach & Co., of course, was neither a party nor a privy to the foreclosure proceedings so far as the claim asserted by Grant is concerned.

Now, just what is meant by *jurisdiction?* It means power to hear and determine *an issue presented by the pleadings.* In other words, a court must have power to

hear and determine the precise matter which it assumes to determine.

This rule is the one that existed at common law, and is the one that is applied by this Court and the Supreme Court of the State of Ohio. It is cogently stated in

Sache v. *Gillette,* (Minn.) 112 N. W. 386, 11 L. R. A. (N. S.) 803, 807,

as follows:

> "The mere fact that the court has jurisdiction of the subject-matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. If the court may do so under the guise of 'jurisdiction of the subject-matter,' then it may commit all sorts of depredations upon the rights of the parties, particularly in default cases.
>
> 'Jurisdiction of the subject-matter' means, not only authority to hear and determine a particular class of action, but authority to hear and determine the particular questions the court assumes to decide. Though it has general jurisdiction over the subject-matter, for instance, of actions to foreclose mortgages, to quiet title to real property, or for damages for personal injuries, its power to decide and determine matters in dispute between the parties in a given action is limited to those questions which are brought before it by the pleadings.
>
> The foundation of the rule that judgments of a court of competent jurisdiction are attended with a presumption of absolute verity is the fact that the parties have been properly brought into court and given an opportunity to be heard upon the matters determined. But the foundation falls and the rule of verity ceases when it affirmatively appears from the record that the judgment adjudicated and determined matters upon which the parties were not heard. When the court goes beyond and outside the issues made by the pleadings, and, in the absence of one of the parties, determines rights against him

> which he has not submitted to it, the authority of the court is exceeded, even though it had jurisdiction of the general subject of the matters adjudicated. Such a departure cannot be held a mere irregularity. This position is sustained both from the viewpoint of our statutes upon the subject and under the rules and principles of the common law."

And again:

> "But the weight of authority sustains the proposition that at common law the judgment is void for want of jurisdiction. In fact, it may be said our statute created no new rule on the subject, but merely adopted that existing at common law. It is laid down in Black on Judgments, 242, as a general principle, that, in addition to jurisdiction of the parties and subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which the judgment assumes to decide, or the particular remedy or relief which it assumes to grant. Support for this doctrine is found in numerous well-considered cases."

The Court then proceeds to make a scholarly and exhaustive survey of the authorities, including several decided by this Court.

In the case before the Supreme Court of Minnesota an action to quiet title had been instituted. Plaintiff had alleged that defendant claimed some right, title or interest in certain real estate. There had been personal service and the entry of default. The court below, however, had entered judgment vesting defendant's interest in plaintiff.

In

Windsor v. *McVeigh*, 93 U. S. 274, 282,

Mr. Justice Field, speaking for the Court, said:

> "The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right

to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application.

All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. *Norton* v. *Meador,* Circuit Court for California. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law.

If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice Miller, to the same purport, in the case of *Ex parte Lange,* 18 Wall. 163. So it was held by this court in *Bigelow* v. *Forrest,* 9 id. 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life-estate of the owner. To the objection that the decree was conclusive that the entire fee was con-

fiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: 'Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction.' Id. 350.

So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is, that the courts are not authorized to exert their power in that way.

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of *Cornell* v. *Williams,* reported in the 20th of Wallace, is more accurate. 'The jurisdiction,' says the justice, 'having attached in the case, every thing done *within the power of that jurisdiction,* when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud.' 20 Wall. 250.''

Now let us briefly notice the cases that hold that a judgment that undertakes to grant relief that is *not responsive* to the pleadings is *void.* A leading case is

Reynolds v. *Stockton,* 140 U. S. 254.

In that case it appeared that suit had been instituted by certain policy-holders (and one stockholder) in the

Hope Mutual Life Insurance Co., a New York corporation against the Superintendent of the Insurance Department of the State of New York and Joel Parker, as Receiver of the New Jersey Mutual Life Insurance Co., which some years before had taken over the assets and assumed the liabilities of the life insurance company first above mentioned. The purpose of the suit was to seize and appropriate to the claims of plaintiffs a fund of $100,000. in securities which the New York Company had deposited with said Superintendent for the protection of policy-holders. Answers were duly filed and a decree for the plaintiffs was entered. In this decree the Court reserved the question of Parker's liability as receiver "as reported by the referee." Subsequently on notice the Court entered a decree against Parker as receiver for $1,010,496.29. This happened in New York. Stockton was Parker's successor. Suit was thereafter instituted against Stockton in New Jersey on the New York judgment. Judgment was rendered for the defendant, and it was contended in the Supreme Court that full faith and credit had not been extended to the New York judgment.

Mr. Justice Brewer rendered the opinion of this Court:

> "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted." * * *
>
> "In the opinion of the Court of Errors and Appeals, the case of *Munday* v. *Vail*, 34 N. J. Law, 418, is cited. In that case, the proposition stated in the syllabus, and which is fully sustained by the opinion, is, that 'a decree in equity, which is entirely aside of the issue raised in the record, is invalid,

and will be treated as a nullity, even in a collateral proceeding.' It appeared that on May 12, 1841, Asa Munday, the owner, with his wife, Hetty Munday, conveyed the premises for which the action (which was one of ejectment) was brought, to John Conger, upon the following trust, to wit: 'For the use and benefit of the said Asa Munday and wife, and the survivor of them, with the remainder to the children of said Asa Munday and wife, in equal parts and shares, in fee.' Plaintiff was the sole surviving issue of Asa Munday and Hetty Munday, and took, under the facts, all the title which, on the 12th of May, 1841, was vested in Asa Munday. On January 16, 1844, Ephraim Munday filed his bill in the Court of Chancery, setting forth that he had loaned certain moneys to Asa Munday upon an agreement that he, the said Asa, would secure said loan by a mortgage upon his land, including the premises in question; and that Asa, in violation of his agreement, and to defraud him of his rights, had conveyed them away to John Conger, upon the trust already mentioned. The bill also showed that plaintiff had obtained judgment for his debt. The prayer was, 'that the deed of conveyance of said lands so made by the said Asa Munday and Hetty, his wife, to the said John Conger, and the said deed and declaration of trust so made, and executed by the said John Conger and wife as aforesaid, may, by the order and decree of this honorable court, be set aside and declared to be fraudulent and void against the said judgment and writ of execution of your orator, and that the said judgment and execution of your orator may be decreed a lien on said lands and tenements so conveyed to said John Conger,' etc. Plaintiff was a defendant in that action, and, then an infant, appeared by her father as guardian. The decree, which was entered on the 15th of December, 1846, was generally that the said deed from Asa Munday and wife to Conger was fraudulent, null and void, and of no force whatever in law or equity; and ordered and adjudged that it be delivered up to be cancelled; and further, that the plaintiff's judgment is and was a lien. No proceedings were had under this decree, the money due plaintiff having been paid or secured to him. Subsequently, and on

September 15, 1851, a decree for costs against Asa Munday, in another suit, was entered in the Chancery Court. Upon such decree the property in question was levied upon and sold to defendant. The validity of the title acquired by this proceeding was the matter in controversy. The title of plaintiff was good under the trust deed of May 12, 1841, unless defeated by this sale and the deed made thereon; and defendant's title, adverse to plaintiff's, depended on the question whether the decree of December 15, 1846, was valid to the extent of its language, annulling absolutely the conveyance from Asa Munday and wife to John Conger, and directing the surrender of such deed, or, notwithstanding its general language, was to be limited to the matters of inquiry presented by the complaint and answer, and, therefore, simply an adjudication that the deed was voidable, and annulling it so far as it conflicted with the rights of plaintiff in that suit, leaving it to stand good as a deed *inter partes*, and valid as to all other parties. It was held that the latter was the true construction, and that the general language in the decree was limited by the matters put in issue by the pleadings. We quote from the opinion:

'The inqiury is, had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are par-

ties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial decision arises. And again:

'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Litt. 352 b. And in a note to the *Duchess of Kingston's Case,* in 2 Smith's Lead. Cases, 535, Baron Comyn is vouched for the proposition that judgments 'are conclusive as to nothing which might not have been in question, or were not material.' For the same doctrine, that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon 'the property according to the rights that appear' upon the record, I refer to the authority of Lord Redesdale. *Gifford* v. *Hort,* 1 Sch. & Lef. 386, 408, See also *Gore* v. *Stacpoole,* 1 Dow. 18, 30; *Colclough* v. *Sterum,* 3 Bligh, 181, 186.' Reference is made in the opinion to the case of *Corwithe* v. *Griffing,* 21 Barb. 9, in respect to which the court said: 'Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, 'as the jurisdiction was confined to the subject-matter set forth and described in the petition.' In this case the court had jurisdic-

tion in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.'

"This case is very much in point. We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit *inter partes*. See also, *Unfried* v. *Heberer*, 63 Indiana, 67. In that case, the inquiry was as to the effect of a decree of foreclosure rendered upon default. In the complaint in the foreclosure proceedings the widow and children of the mortgagor were named as parties, he having died prior to the commencement of the suit. The allegation of the complaint was that the defendants were interested as heirs, and the prayer was for a decree foreclosing such interests. It was not averred that the widow had joined in the mortgage, or even that she was a widow; but she was made a defendant, and alleged to be an heir. Subsequently she asserted rights in the premises as widow, and in respect to this decree upon default, the court observed: 'A widow is an heir of her deceased husband only in a special and limited sense, and not in the general sense in which that term is usually used and understood. When the said Anna made default in the action for foreclosure, nothing was taken against her as confessed, nor could have been, which was not alleged in the complaint, and, as nothing was alleged hostile to her claim as widow, it follows that nothing concerning her claim as such widow was concluded against her by the judgment of foreclosure. This proposition we regard as too well founded in principle to need the citation of authorities to sustain it. See, however, *Helms* v. *Love*, 41 Indiana, 210; *Fletcher* v. *Holmes*, 25 Indiana, 458; *Minor* v. *Walter*, 17 Mass. 237.' See also *Goucher* v. *Clayton*, decided by Vice-Chancellor Wood, and reported in 11 Jurist (N. S.) 107; S. C. 34 Law Journal (N. S.) Ch. 239.

"In the case of *Packet Company* v. *Sickles*, 24 How. 333, 341, Mr. Justice Campbell, speaking for the court, declared, that, 'the essential conditions

under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties in the character in which they are litigants. In the case of *Smith* v. *Ontario,* 18 Blatchford, 454, 457, Circuit Judge Wallace observed, that 'the matter in issue' has been defined in a case of leading authority, as 'that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading.' *King* v. *Chase,* 15 N. H. 9.

But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action, and in that suit service on, or appearance of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same State; and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another State.

"This proposition determines this case; for, as has been shown, the scope and object of the suit in the New York court was the subjection of the fund in the hands of the superintendent of the insurance department of that State to the satisfaction of claims against the New York company. The cause of action disclosed in the original complaint was not widened by any amendment; and there was no actual appearance by the receiver Parker or the New Jersey company subsequently to the filing of their answer. No valid judgment could, therefore, be rendered therein, which went beyond the subjection of this fund to those claims."

See also:

Charles v. *White* (Mo.) 112 S. W. 545, 21 L. R. A. (N. S.) 481.

> "A court has no power in a creditors' bill against life tenants and remaindermen to set aside a deed from the debtor to them as in fraud of the rights of the creditor, in which no issue is raised between the life tenants and remaindermen, to devest the title of the latter and vest it in the life tenants as general heirs of the debtor, and a judgment attempting to do so is subject to collateral attack."

Seamster v. *Blackstock,* (Va.) 2 S. E. 36.

> "A widow brought suit in the county court for the sole purpose of having dower assigned her in her deceased husband's lands; the heirs at law, who were infants, being made defendants. The court not only directed an assignment of dower, but, *sua sponte,* decreed a sale of the residue of the land belonging to the heirs. *Held,* that the court having exceeded its jurisdiction, the decree of sale was void, and might be collaterally attacked."

Banking House of Castetter v. *Dukes* (Nebr.) 97 N. W. 805.

Spoors v. *Coen,* 44 Ohio St. 497, 9 N. E. 132.

> "The judgment of a court upon a subject of litigation within its jurisdiction, but not brought before it by any statement or claim of the parties, is null and void, and may be collaterally impeached." (In this case the syllabus was by the Court.)

We have already seen that the relief to be granted depends upon the cause of action stated; that the prayer of a complaint is no part of plaintiff's cause of action; that it constitutes no part of the issues to be tried (pp. 16-17, *supra*). We have likewise seen that the plain-

tiff in the Court of Common Pleas alleged no facts which showed that he was entitled to the appointment of a receiver for property not covered by the mortgage. Neither were any facts alleged that would give the said court jurisdiction to direct either the seizure of any property not covered by said mortgage or the institution of any suit against Leach & Company.

Under the authorities above cited it is too clear for argument that the order appointing Grant receiver of property not covered by the mortgage and the order directing him to sue Leach & Co. were not responsive to the issues; that they were beyond the scope of the proceedings, which was solely for the foreclosure of a mortgage, and that consequently each of said orders was, *pro tanto, void.*

In other words, the record clearly shows that Grant, as receiver, has no authority to maintain this suit; that, as held by the Circuit Court of Appeals, the Court of Common Pleas could not authorize Grant to maintain said suit.

III.

In appointing Grant receiver the Court of Common Pleas transcended the power conferred upon it by statute, and its order was void, not only with respect to the property not covered by the mortgage, but with respect to all other property of the mortgagor.

Section 11894 of the Ohio Code (see p. 22 of our former brief) specifies when and under what circumstances a Common Pleas Court may appoint a receiver. The only two subsections that have any relevancy to the case at bar are subsections 2 and 6, which are set forth in the margin.[2]

So far as subsection 2 is concerned, it will be observed:

1. That a mere failure to perform a condition of the mortgage is not sufficient ground for the appointment of a receiver. In such a case it must also appear that the mortgaged property "is probably insufficient to discharge the mortgage debt."

2. That the court is given power to appoint a receiver for only the *mortgaged property.*

---

2. "2. In an *action by a mortgagee, for the foreclosure* of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

"6. *In all other cases in which receivers heretofore have been appointed by the usages of equity.*"

> 3. That a receiver for the mortgaged property may be appointed only when "it appears that the mortgaged property is in danger of being lost, removed or materially injured."

It is also apparent that subsection 2 is a mere codification of the "usages of equity," mentioned in subsection 6. A receivership in foreclosure is an extraordinary remedy, and not a matter of right. A strong showing must be made to obtain this equitable remedy; and from time immemorial courts have refused to grant the remedy against a mortgagor in possession pending foreclosure where the said mortgagor is solvent, the mortgage security is adequate, and the mortgaged property is not in danger of being lost, removed or materially injured.

> Jones on Mortgages (8th ed.) § 1948 (original section 1532)

By referring to our analysis of the petition to foreclose (pp. 12-15, *supra*), the Court will observe:

> That there are no allegations that the mortgaged property is in danger of being lost, removed or materially injured; or that the said property is probably insufficient to discharge the mortgage debt; or that the mortgagor is insolvent, or in imminent danger of insolvency; or that it has been dissolved; or any other facts which bring the case within the requirements of subsection 2 of Section 11894.

True, the plaintiff alleged that the trust deed provided that in case of default and the institution of legal proceedings, the trustee should be entitled to a receiver for the mortgaged property. But this is a question of *jurisdiction* of the Court of Common Pleas to appoint a receiver. Needless to say, that jurisdiction is defined by the Code; and if the Code has not conferred juris-

diction, the parties to the trust deed cannot do so by means of a mere private agreement.

Baker v. *Varney* (Cal.) 62 Pac. 100, cited and quoted from on pp. 27-8 of our former brief.

We respectfully submit that since the Code does not confer jurisdiction upon a Court of Common Pleas to appoint a receiver in foreclosure proceedings whenever the parties to a mortgage have agreed that one may be appointed, it necessarily follows that the jurisdiction does not exist. See also:

Couper v. *Shirley* (C. C. A. 9th Cir.) 75 Fed. 168.

Jarvis v. *McQuaide,* 53 N. Y. S. 97.

People v. *Weigley,* 155 Ill. 401, 40 N. E. 300.

Cuykendall v. *Corning,* 88 N. Y. 129, 139.

Now let us notice a few authorities which hold that where a court transcends the powers granted by statute its judgment or order is void and may be collaterally attacked. In

Murray v. *American Surety Co.* (C. C. A. 9th Cir.) 70 Fed. 341

the Court held as indicated in the following syllabus:

"The California 'Bank Commissioners' Act' (St. 1877-78, p. 740, as amended by St. 1886-87, p. 90) provides in section 11 that if the commissioners shall find that any bank has violated its charter or law, or is conducting business in an unsafe manner, they shall require it to discontinue such practices; and in case of refusal, or whenever it shall appear to the commissioners unsafe for the bank to continue business, they shall notify the attorney general, who may commence suit to enjoin the transaction of business by such bank; and, upon the hearing of such suit, the court may issue the injunction, and direct the commissioners to take such proceedings

against the bank as may be decided on by its creditors. The section also empowers the commissioners to supervise the affairs of banks in process of liquidation, limit the number of their officers and employes, and requires reports to the commissioners by such banks. HELD, that a court in which proceedings are instituted by the attorney general against a bank pursuant to such statute has no jurisdiction to appoint a receiver of the property of the bank in such proceedings, though the bank commissioners and the creditors of the bank consent, and though there are provisions in the Code of Civil Procedure authorizing the appointment of receivers in other proceedings. 59 Fed. 345, and 61 Fed. 273, affirmed.

"The exercise by a court, in purely statutory proceedings, of a power not authorized by the statute, is null and void, and may be collaterally attacked."

The case of

Russell v. *Shurtleff* (Colo.) 65 Pac. 27,

is particularly valuable because of its review of some leading cases decided by this Court. In that case it was held:

"Under Mills' Ann. Code, § 169, providing that, if there is no answer, the relief granted to plaintiff shall not exceed that which he shall have demanded in his complaint, where the complaint prayed for judgment for a certain sum less one-fourth thereof, with interest, in the proportion of the respective interests of the defendants, a joint judgment against all the defendants for such sum on their default is beyond the jurisdiction of the court, and void.

"Under Mills' Ann. Code, § 49, providing that the complaint shall contain a demand for the relief which plaintiff claims, a complaint demanding judgment against several defendants for a certain sum less one-fourth thereof in the proportion of their respective interests, and for other and further relief, as the court might deem just and equitable, does not authorize a joint judgment against all the defendants on their default, since the general prayer

is not such a demand for relief as will support a default judgment."

The Court said:

"Section 169, Mills' Ann. Code, expressly provides that, if there be no answer, the relief granted the plaintiff shall not exceed that which he shall have demanded in his complaint. The prayer of the complaint in this case was for a several judgment in proportion to the respective interests of the defendants. The one rendered was joint for the entire sum. That this was error cannot be successfully controverted. Whether it rendered the judgment void, or merely voidable, is the crucial question. One of the essentials of a valid judgment is that the court pronouncing it must have jurisdiction to render that particular judgment (*Newman* v. *Bullock,* 23 Colo. 217, 47 Pac. 379; 12 Am. & Eng. Enc. Law (1st Ed.) 246); and, if it appears from the record of a judgment that the court in pronouncing it acted without jurisdiction, it is void (*People* v. *District Court,* 22 Colo. 422, 45 Pac. 402; *Brown* v. *Wilson,* 21 Colo. 309, 40 Pac. 688, 52 Am. St. Rep. 288; *Great West Min. Co.* v. *Woodmas of Alston Min. Co.,* 14 Colo. 90, 23 Pac. 908). The distinction between void and voidable judgments is often refined, and difficult of solution. 'A judgment may be erroneous, and not void; and it may be erroneous because it is void.' *Ex parte* Lange, 18 Wall. 163, 21 L. Ed. 872.

"There can be no doubt, as stated in *Newman* v. *Bullock, supra,* 'that the tendency of the later authorities, especially in the federal courts, is to enlarge the definition of jurisdiction to make it include not only the power to hear and determine, but also the power to render the particular judgment in the particular case.' This doctrine is based upon the proposition that, if a court is not invested with power to render a particular judgment, its attempt to do so is without its jurisdiction, and must not be confounded with the proposition that the rendition of an erroneous judgment within its power is but the erroneous exercise of its jurisdiction. With full jurisdiction to pronounce a judgment which would

be bindng upon the defendants and their property, the power and authority of the county court was limited by definite, statutory provisions as to the character of relief which could be granted against defendants who had not answered. By directing a joint judgment when an individual one only was prayed for, the trial court transcended its authority, and violated express statutory commands; for, although its jurisdiction attached to the parties, a judgment not within the powers granted by the law of its organization is void. *Ex parte Lange, supra*: *U. S.* v. *Walker,* 109 U. S. 258, 3 Sup. Ct. 277, 27 L. Ed. 927.

"*U. S.* v. *Walker* was an action by an administrator de bonis non on the bond of an administratrix to recover money received for assets of the estate collected by the latter, and which, by order of the court, in the settlement of her account as administratrix, she was directed to pay over to the administrator de bonis non. The law of the jurisdiction under which the administratrix acted provided that upon the removal of an administrator the court shall have authority to direct that assets of the deceased in his hands, which may remain unadministered, be delivered to the newly-appointed administrator. The court concluded that this statute did not change the common-law rule to the effect that an administrator de bonis non derives his title from the deceased, and not from the former administrator; that to him is committed only the administration of the assets of the deceased which have not been administered; and, therefore, assets of the estate which had been converted into money by the former administrator were funds to which he was not entitled. It was urged that the decree directing the administratrix to pay over these funds to her successor was conclusive in the suit upon her bond, for the reason that such decree could not be collaterally attacked. The supreme court held to the contrary, because, as stated, in effect, the court directing the decree exceeded its jurisdiction, in that its authority for making the order was limited to assets of the decedent in the hands of the administrator which were not administered upon.

"*Bigelow* v. *Forrest,* 9 Wall. 339, 19 L. Ed. 696, was an action of ejectment. Bigelow, who was de-

fendant in the trial court, relied for title on a sale made under a decree of the United States district court rendered in a proceeding for the confiscation of the premises sued for under the act of July 17, 1862. This act provided that the property of an officer of the army or navy of the Confederate government might be seized and sold, which proceedings should operate to devest the owner of the property so seized of any interest therein during his life. Under this act a decree had been rendered which purported to direct a sale of the property in fee. The heir of the owner claimed that the decree was void in so far as it purported to direct an unconditional confiscation of the property in question. In the action of the ejectment it was contended that this question could not be raised collaterally. The supreme court said: 'Doubtless, a decree of a court having jurisdiction to make the decree cannot be impeached collaterally, but under the act of Congress the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest;' and the court therefore held that so much of the decree of the court in which the confiscation proceedings were had as was in excess of its powers was void."

The Court then quoted from *Windsor* v. *McVeigh*, 93 U. S. 274, and continued its opinion as follows:

"In the case at bar, when the court directed a joint, instead of a several, judgment, as prayed in the complaint, in the face of an express provision of the Code that the relief granted in the circumstances of this case could not exceed that prayed for, it did that which was beyond its power, and foreign to its authority, and hence without its jurisdiction. 1 Freem. Judgm. (4th Ed.) sec. 116."

See also:

Windsor v. *McVeigh*, 93 U. S. 274.

Bigelow v. *Forrest*, 9 Wall. 339.

United States v. *Walker*, 109 U. S. 258.

Wilcox v. *Jackson*, 13 Pet. 498, 511.

Hatch v. *Ferguson* (C. C. A. 9th Cir.) 68 Fed. 43.

The foregoing authorities are particularly applicable to property not covered by the mortgage, viz., the mortgagor's alleged claim against Leach & Co.

Of course, if the Court of Common Pleas did not have the power to appoint a receiver for such "property", it necessarily follows that the title of the mortgagor thereto remained unimpaired by the order appointing a receiver. The record does not show that any assignment of the alleged claim ever was made by the mortgagor to Grant as receiver. And, of course, the order directing that Grant bring suit against Leach & Co. was *coram non judice* and void.

Cases holding that stockholders in a corporation cannot question an order directing a receiver to sue stockholders on subscription agreements or to enforce other statutory liability to creditors are clearly not in point. Stockholders are bound by what binds the corporation in such circumstances.

Furthermore, the record shows that Grant was appointed receiver without notice to The Struthers Furnace Company. The petition to foreclose was filed on January 15, 1925 (Tr. 250). The Baldwin suit was instituted on January 15, 1925 (Tr. 254). An order appointing Grant receiver was entered in the Baldwin suit, after consolidation, on January 20, 1925 (Tr. 259) and in the foreclosure suit on January 22, 1925 (Tr. 251).

Section 11279 of the Ohio Code reads as follows:

> "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

Section 11283 provides, *inter alia,* that—

> "When the time for bringing parties into court is

> not fixed by statute, the summons shall be returnable on the second Monday after its date."

January 15, 1925, was on a Thursday. The second Monday after January 15th would be January 26th. Yet Grant was appointed receiver on Tuesday, January 20, 1925, before the defendant was bound to enter an appearance, and before, so far as the record shows, it had appeared. The orders recite that the cause was heard upon the petitions that a receiver be appointed forthwith, and that the Court granted the "prayers" of said petitions. It does not appear that The Struthers Furnace Co. had then been even served with process.

In

Railway Co. v. *Jewett,* 37 Ohio St. 649,

it was held:

> "The appointment of a receiver to take from defendant the possession of his property, cannot be lawfully made, unless the delay required to give such notice will result in irreparable loss."

In addition to the cases cited in the opinion in the case above mentioned, see:

> *Ober* v. *Excelsior Planting & Mfg. Co.* (La.) 10 So. 792.

There was absolutely no showing made in the petitions that any loss would result from the delay requisite to give notice. Indeed the appointment of a receiver "forthwith" was not asked in either petition. No facts were alleged which justified the appointment of a receiver to preserve the property from injury, etc. (pp. 12-15, *supra*). Here again the action of the court was

not responsive to the pleadings; here again the court transcended the powers granted by law.

The order appointing the receiver was also void for the reason that it authorized the receiver to manage and conduct the business of the defendant corporation. What possible justification was there for such action by the Court in the foreclosure proceedings? Here again the order was not responsive to the pleadings. Certainly such drastic action should not have been taken without notice. And since Leach & Co. was neither a party nor a privy to the proceedings in the Court of Common Pleas, it follows that it may question the jurisdiction of the said Court in this case (pp. 22-35, *supra*).

The cases cited by petitioner on the general subject of collateral attack are so manifestly inapplicable to the facts in the case at bar as not to call for an analysis of them.

We have always been and are now convinced that this Court must under the statute take the entire case, and that the respondent is entitled to argue that even if the petitioner were entitled to institute his suit, the undisputed facts disclosed by the record prevent a recovery as a matter of law.

However, counsel for petitioner have acquainted us with the correspondence that passed between them and the Chief Justice, and for that reason we have not discussed the merits.

The amount involved is large; and of course we wish to be heard on the merits, either by this Court or by the Circuit Court of Appeals, in the event that this Court

holds that the Circuit Court of Appeals erred in not passing on the merits.

Respectfully,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. [redacted] 9

HUGH W. GRANT, Receiver of the Struthers Furnace Company,

Petitioner,

vs.

A. B. LEACH & COMPANY, INC.,

Respondent.

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO MOTION OF GRANT. AS TRUSTEE IN BANKRUPTCY. TO INTERVENE AS A PARTY PLAINTIFF.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 479

HUGH W. GRANT, Receiver of the Struthers Furnace Company,

Petitioner,

vs.

A. B. LEACH & COMPANY, INC.,

Respondent.

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO MOTION OF GRANT, AS TRUSTEE IN BANKRUPTCY, TO INTERVENE AS A PARTY PLAINTIFF.

MAY IT PLEASE THE COURT:

We shall disregard the obvious formal defects of the motion for leave to intervene in the case at bar, and assume that it is a motion by Hugh W. Grant, as trustee in bankruptcy in the matter of The Struthers Furnace Company, a corporation, bankrupt, for leave to intervene "as a party plaintiff" herein.

The reasons assigned for this extraordinary request are unique. They are that The Struthers Furnace Company was adjudicated a bankrupt on April 18, 1927; that

"this applicant" was appointed trustee in bankruptcy on July 10, 1929; that a cause of action exists in *either* the petitioner herein (Hugh W. Grant, as *receiver* of The Struthers Furnace Company), *or* this trustee, for the benefit of creditors and stockholders; that (nevertheless!) the rights, obligations and duties of the aforesaid petitioner and trustee "are *identical* for the purposes of this suit"; that the "intervention of your applicant as a party plaintiff in this suit will avoid a multiplicity of suits, *and will obviate the necessity of instituting an original action in the event that it should be held that the state court receiver had no authority to institute this action* (!); that, strangely enough, "your applicant" believes that the *receiver* has a meritorious cause of action, and that "the conduct of the company was unlawful and fraudulent as to the creditors and stockholders of the company." (Page 2.)

Of course, the motion must be denied. Before stating our reasons, permit us first to state:

SOME ESSENTIAL FACTS.

The petitioner herein (Hugh W. Grant, as *receiver* of The Struthers Furnace Company) owes his appointment to the Court of Common Pleas of Mahoning County, Ohio. (Tr. 251, 259.) He was so appointed in *two* suits. As shown in our briefs heretofore filed, the court was without jurisdiction to make the appointment in the *Baldwin suit,* for the reason that it was a suit by a stockholder solely for the appointment of a receiver.

The other suit was a suit by a trustee to foreclose a mortgage or deed of trust executed by The Struthers Furnace Company to secure certain bonds. This mortgage or deed of trust covered only the *specific prop-*

erty therein mentioned. *The claim here asserted by the petitioner against Leach & Co. was not covered by the said mortgage or deed of trust, neither was the other property of The Struthers Furnace Company.*

As shown in our briefs heretofore filed:

1. The State Court was without jurisdiction to appoint Grant receiver—at least of property not covered by the mortgage or deed of trust.

2. The State Court was without jurisdiction to authorize Grant, as receiver, to institute the suit herein against A. B. Leach & Co., Inc.

The sole question presented to this Court was whether Grant, as receiver, had authority to maintain this suit. In other words, *did he own, or was he authorized to represent, the alleged claim against A. B. Leach & Co., Inc?*

Grant was appointed receiver, first on January 20, and again on January 22, 1925. (Tr. 259, 251.) Suit was instituted by the aforesaid receiver in the District Court of the United States for the Northern District of Ohio, Eastern Division, against Leach & Co. on *August 5, 1925.* (Tr. 2.) After a hearing on the merits final decree was entered by that court in favor of the receiver on *March 18, 1926.* (Tr. 214.) On *July 11, 1928,* the Circuit Court of Appeals for the Seventh Circuit reversed the decree of the District Court on the ground that Grant, as receiver, had no authority to maintain this suit. (Tr. 270.) Subsequently this Court granted the receiver's petition for certiorari, and the cause was argued on April 11, 1929.

While it is true that Hugh W. Grant was not appointed

trustee in bankruptcy until July 10, 1929, this was due to the facts that on *April 23, 1927,* Hugh W. Grant, as *receiver,* procured the vacation of the order adjudicating The Struthers Furnace Company a bankrupt, and that this order of vacation was not reversed by the Circuit Court of Appeals until *February 15, 1929.* (*Struthers Furnace Co.* v. *Grant,* 30 Fed. (2d) 576.)

SUMMARY OF ARGUMENT.

1. Grant, as *receiver,* either has, or has not, authority to maintain this suit. If he has *not,* then there is no occasion to consider the motion of Grant, as *trustee,* to *intervene.*

2. If Grant, as *receiver,* has authority to maintain this suit, then there is no occasion for the intervention of Grant, as *trustee.* Grant's intervention is antagonistic and not "in subordination to, and in recognition of, the propriety of the main proceeding," as required by Equity Rule 37.

3. Grant, as *trustee,* was not a party to the suit in either of the courts below; and his proposed intervention is contrary not only to Equity Rule 37, but to the Constitution and the uniform practice of this Court.

ARGUMENT.

I.

Grant, as receiver, either has, or has not, authority to maintain this suit. If, as we contend, he has not, then there is no occasion to consider the motion of Grant, as trustee.

United Copper Securities Co. v. *Amalgamated Copper Co.*, 244 U. S. 261.
Railway Company v. *Twombly*, 100 U. S. 78, 81.

This is true for obvious reasons. Equity rule 37 provides that any "intervention shall be in *subordination* to, and in recognition of, the propriety of the main proceeding." If Grant, as *receiver*, has no power to maintain this suit, then it must be dismissed. And if that is done, the main proceeding will be at an end. There will then be no proceeding pending in which intervention is possible.

In the second place, this Court's jurisdiction of this controversy is exclusively *appellate*, not original. The sole question before this Court is whether the Circuit Court of Appeals erred in holding that Grant, as *receiver*, is without authority to maintain this suit. No new issues can be joined or tried here. If Grant, as *trustee*, owns, or is authorized to represent, the claim asserted here by Grant, as *receiver*, against Leach & Co., then Grant, as *trustee*, must assert it in a *nisi prius* court.

Grant, as *receiver*, and Grant, as *trustee*, are different

juristic persons, even if it be assumed, in the absence of proof, that the same human being is acting in the two different capacities. Leach & Co., Inc., is entitled to its day in court. It is entitled to know what claim Grant, as *trustee,* has against it; to file an answer; to require that Grant first make proof; to adduce evidence in its own behalf, and to be heard through its counsel. In

United States v. *Innerarity*, 19 Wall. 595, 22 L. ed. 202 this Court said:

> "The attempt to set up a claim under this petition or a supplemental petition by Innerarity's heirs in favor of the heirs of John Watkins, cannot be sustained. It does not appear that Watkins derived title from Innerarity, *or that Innerarity ever had any title.* The case is simply this: *Innerarity's heirs have filed their petition in time, but have no title.* Watkin's heirs have a title, but have not filed a petition for its allowance. *Watkin's title cannot be interposed by the present petitioners. Such practice is unknown. If a suit be commenced by A. to recover land or money, he failing on the merits, cannot bring into his suit a new plaintiff, especially one whose action, if then commenced, would be barred by the statute of limitations. If otherwise, the same suit can be continued indefinitely, constantly making new plaintiffs, until some one shall be found who has a meritorius claim.* It would be a practical abrogation of the limitation of the statute. The act of 1867 has been further extended, and the heirs of Watkins must make an original application in their own names. We understand the case of *United States* v. *Patterson* to be a decisive authority against the present claim."

See also:

Vannier v. *Aanti-Saloon League*, 238 N. Y. 457, 144 N. E. 679.

II.

If Grant, as receiver, has authority to maintain this suit, then there is no occasion for the intervention of Grant, as trustee. The only purpose of the intervention of Grant, as trustee, is to assert that he, and not Grant, as receiver, owns or is authorized to represent the alleged cause of action sought to be enforced against Leach & Co., Inc. BOTH of them cannot own it, neither can BOTH of them be plaintiffs, either jointly or alternately. It is either one or the other, or neither. It follows, therefore, that the proposed intervention of Grant, as trustee, is not "in subordination to, and in recognition of, the propriety of the main proceeding," as required by Equity Rule 37.

Hill v. *Wilson*, 210 Fed. 200

First Trust Co. v. *Illinois Cent. R. Co.*, 252 Fed. 965, certiorari denied 39 S. Ct. 390, 249 U. S. 615, 63 L. ed. 803.

Hopkins v. *Lancaster*, 254 Fed. 190.

Cauffiel v. *Lawrence*, 256 Fed. 714.

Schell v. *Leander Clark College*, 10 Fed. (2d.) 542.

Brictson Mfg. Co. v. *Woodrough*, 284 Fed. 484.

III.

Grant, as trustee, was not a party to the suit in either of the courts below; and his proposed intervention is contrary not only to Equity Rule 37, but to the Constitution and the uniform practice of this Court.

The United States v. *Patterson*, 15 How. 10, 14 L. ed. 578.

In *re Chewaucan River,* 89 Ore. 659, 171 Pac. 402:

> "The Supreme Court is a court of appellate jurisdiction only, and cannot admit interveners who were strangers to the proceeding below, as that would be an exercise of original jurisdiction."

Wenborne-Karpen Dryer Co. v. *Cutler Dry Kiln Co.,* (C. C. A. 2nd Cir.), 292 Fed. 861, certiorari denied, 44 Sup. Ct. 36, 263 U. S. 708.

Marsh v. *Nichols,* 120 U. S. 598, 7 Sup. Ct. 704, 30 L. ed. 796.

The William Bagley, 5 Wall. 377, 412 18 L. ed. 583.

People's Mutual Life Ins. Co. v. *Fagan,* 143 Ark. 78, 219 S. W. 738:

> "Where the legal representative of an insured brought an action on a life policy, when the action should have been brought by the representative of the beneficiary, who predeceased the insured, and a judgment was rendered in favor of the plaintiff, on appeal the Supreme Court had no jurisdiction to substitute the legal representative of the beneficiary as a party plaintiff."

Harrison et al. v. *Nixon,* 9 Pet. 483, 527.

Succession of Herdman, (La.), 97 So. 664.

Bryson v. *Great Northern Ry. Co.* (Mont.) 203, Pac. 529, 532.

Blatchford v. *Newberry,* 100 Ill. 484, 492-3.

In

United States v. *Patterson,* 15 How. 10, *supra,*

this Court said:

> "In this cause, as well as in that of the United States v. Samuel Davenport's Heirs, a motion was submitted on behalf of the heirs of Joseph Piernas alleging that a deed from Joseph Piernas to Victor Portia, dated the 30th August, 1804, being a link in the title to the Ormegas grant, was not sufficiently proven, and suggesting that it was not a genuine

deed, *and praying for leave to intervene in this suit to sustain their rights to this property.*

"The court is of opinion that the motion cannot be allowed. The plaintiff commenced his proceedings to assert his own claims against the United States. Those proceedings can neither benefit nor injure the persons interested in this motion, for they are not parties to the cause. The period for the assertion of a claim under the act of Congress of 17th June, 1844, has expired. Neither in the District Court nor in this court would it be lawful for persons, who failed to avail themselves of the benefit of that act during its operation, to intervene for the purpose of establishing a right under grants like these, after its expiration, in a suit commenced by other persons.

"In looking through the record, we find no fact to authorize the belief that the heirs of Piernas have any title to the lands embraced in these grants. If, therefore, it was compatible with the constitution and practice of this Court, for a person to intervene here in a litigation, to which he was no party in the court of original jurisdiction, we find nothing to authorize it in the present instance."

The time for the filing of a petition for certiorari in behalf of Grant as *trustee*, has also expired, even if one might be filed in behalf of a (juristic) person who was not a party in either of the lower courts.

It follows, therefore, that the anomalous motion herein must be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 9

HUGH W. GRANT, Receiver of the Struthers Furnace Company,
Petitioner,

vs.

A. B. LEACH & CO., INC.,
Respondent.

RESPONDENT'S PETITION FOR REHEARING.

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Respondent.

RESPONDENT'S PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

The respondent respectfully asks that a rehearing be granted in this cause for the following reasons:

1. The Court inadvertently construed against the respondent its contract with The Struthers Furnace Company for the purchase of the bond issue. The construction of this contract obviously concerns the *merits,* which were not properly before this Court. The Court's construction is, we believe, erroneous. Whether it is or not, this Court should not, in passing upon purely *jurisdictional* questions, express its views on the merits.

2. The Court's holding that the Common Pleas Court had jurisdiction of the petitions for the appointment of a receiver in the suits of the mortgage trustee and preferred stockholder, and that, therefore, the orders subsequently made by it could

not be collaterally attacked, is, we respectfully submit, contrary to settled law.

3. The Court departed from the issues joined in the Circuit Court of Appeals, and failed to give effect to the stipulation of the parties in that court.

4. The Court (in one instance) inadvertently misstated the contentions of respondent.

5. A re-examination of the record will, it is believed, show that the Court has inadvertently failed to pass upon the respondent's contentions, and that the decision rendered is unsound.

6. The Court's decision that Grant, as receiver, could sue in the District Court is based upon a misapprehension of the facts, and, we respectfully submit, is erroneous.

I.

This honorable court inadvertently construed against the respondent its contract with the Struthers Furnace Company for the purchase of the bond issue.

On page 2 of the Court's opinion it is said:

> "1. The bonds in question were part of an issue of eight per cent bonds of the Furnace Company, secured by a mortgage upon certain real and personal property. In 1922 Leach & Co. purchased from the Furnace Company a large number of these bonds, at 90½ and accrued interest, *in exchange for 3,000 shares of the seven per cent preferred stock of the Furnace Company, at 85 and accrued dividends.*" (Italics ours.)

The contract for the purchase of the bonds gave Leach & Co. the option to purchase at 90½ *the whole or any part* of an issue of $1,500,000. par value. (R. 22.) It also provided that in the event the option was exercised, Leach & Co. should pay cash for all bonds purchased up to $800,000. par value. If bonds in excess of $800,000.

par value were purchased, then Leach & Co. were to pay for bonds of the par value of $450,000. *partly in cash and partly in preferred stock.* The remaining bonds, of the par value of $250,000., if taken, were to be paid for in cash. (R. 23.)

Leach & Co. made *one* election to take the *entire* issue of bonds, (R. 135), and thereafter did so. When Grant, as receiver, sought to rescind this executed contract, he did not tender the preferred stock *and* the more than $1,000,000. in cash that had been paid thereunder, but only the preferred stock. The respondent contended that *partial* rescission of an executed contract was unknown to the law; that it had never agreed to pay *all* cash for *all* the bonds, and that the court could not make a new or better contract for the company, especially some three years afterwards when conditions had changed. The respondent also contended that Grant, as receiver, could not separate that part of the contract that permitted respondent to pay partly in cash and partly in preferred stock from the other parts of the contract, in view of the *single* election made by respondent, and that in any event *no* bonds had been paid for *wholly* in preferred stock.

The District Court held that Grant could at the same time "both approbate and reprobate," and that there was no other consideration for part of the bonds than 3,000 shares of preferred stock. (R. 205, 213.) According to the authorities the learned court was wholly wrong.[1] However, that question is not now

1. **Stewart v. Stewart Hotel Co., (Cal.) 164 Pac. 620.**
Memphis & Little Rock R. R. Co. v. Dow, 120 U. S. 287.
McKee v. Title Ins. & Trust Co., (Cal.) 113 Pac. 140.
Missouri River, Ft. Scott & Gulf R. R. Co. v. Commissioners, 12 Kans. 482—Brewer, J.
Dickerman v. Northern Trust Co., 176 U. S. 181, 202.

before this Court, nor was it argued on the hearing. What this Court does by means of the excerpt above quoted is not to state the *facts*, but to *construe* the contract, *apply the law*, and announce *legal conclusions*. This cannot fail to prejudice the respondent in any future hearing on the merits. Since the Court merely undertook to determine jurisdictional questions, we respectfully submit that any intimation of its views on the merits is improper.

Jones v. *Randolph*, 104 U. S. 108, 110.
Meccano, Ltd. v. *Wanamaker*, 253 U. S. 136.
Glasgow v. *Baker*, 128 U. S. 560, 577-8.
2 Austin's Jurisprudence, p. 658 (Lecture 39.)
Hoe v. *Wilson*, 9 Wall. 501, 503.

We respectfully ask that the foregoing excerpt from the opinion herein be changed to state the *facts*, rather than legal conclusions.

II.

The court's holding that the common pleas court had jurisdiction of the petitions for the appointment of a receiver in the suits of the mortgage trustee and preferred stockholders, and that, therefore, the orders subsequently made by it could not be collaterally attacked is, we submit, demonstrably erroneous.

On page 5 of the opinion it is said:

"The Common Pleas Court had jurisdiction of

Burnes v. Burnes, (C. C. A. 8th Cir.) 137 Fed. 781, 800.

St. Louis, Vandalia and T. H. R. R. Co. v. Terre Haute and Indianapolis R. R. Co., 145 U. S. 393.

Bullard v. Eames, (Mass.) 106 N. E. 584, 586.

Pittsburgh F. B. & T. v. American Clay Machy. Co., (Ohio) 106 N. E. 33.

Central Ohio Natural Gas & F. Co. v. Capital City Dairy Co., (Ohio) 53 N. E. 711.

> the petitions for the appointment of a receiver in the suits of the mortgage trustee and preferred stockholder; and the power to determine whether, under the allegations of the petitions, it was authorized to appoint a receiver of the Company's property; to what extent and for what purposes; and what authority should be vested in him as such receiver."

This is the first ground upon which the Court rested its decision, and the principle above stated is applied on pages 5 and 6 of the opinion. It is there held that neither the orders appointing the receiver, nor the order directing him to sue, even if they were so erroneous that they would have been set aside on appeal, can be collaterally attacked, because the court had jurisdiction of the petitions and was authorized to determine what action it should take.

We respectfully submit that the vice of this Court's decision lies in—

> (a) the erroneous assumption that the power of a court to determine whether or not it is authorized to act renders any action taken by it invulnerable to collateral attack;
>
> (b) the equally erroneous assumption that where jurisdiction of a cause is once obtained no order thereafter made therein can be collaterally attacked;
>
> (c) a misapprehension of what constitutes jurisdiction, and
>
> (d) the erroneous conclusion that the Common Pleas Court had jurisdiction to make the orders in question.

In every case that is, or can be, brought before it a court has the power to determine whether or not it is authorized to grant the relief prayed for, and whether or not it should do so. But that is far from determining *jurisdiction.*

Take, for example, the case where an application for letters testamentary or of administration is made to a probate court. The court has power to grant these letters in a proper case. Certainly it has power to determine whether or not it is authorized to grant the letters. But even if the proceedings are in all respects regular, if it should appear after the estate has been closed that the supposed decedent was in fact still alive, the entire proceedings would be *void,* and any sale of real estate or other property would be subject to *collateral attack.*[2] Or take the case where a person has been convicted of an offense under an unconstitutional act, or where a single offense has been split up into several causes and the offender pursued twice or more. In each of these cases the court would have the power to determine the questions presented to it for decision. And yet, in case of conviction the judgment would be void.

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2. **Griffith v. Frazier, 8 Cranch 9, 3 L. ed. 471.**
Duncan v. Stewart, 25 Ala. 408.
Beckett v. Selaver, 7 Cal. 215, 242.
Jochumsen v. Suffolk Savings Bank, 3 Allen (Mass.) 87.
Withers v. Patterson, 27 Tex. 491.

According to the Court's opinion herein, even if it appeared on the face of an application for letters testamentary upon the estate of a person that the person in question was alive and compos mentis, no order granting the application or ordering the sale of real estate would be subject to collateral attack. We say this for the reason that an action solely for the appointment of a receiver, at the instance of a stockholder, who charges no breach of duty or other wrongful act, is as unknown to the law as an application for letters of administration or testamentary upon the estate of a living person. And yet this Court held that because the Court of Common Pleas had "jurisdiction" of the petition and power to determine whether it was authorized to appoint a receiver, the orders entered by it could not be collaterally attacked even by one not a party to the proceeding when some one else claimed the benefit of them.

No appeal would be necessary. The defendant would be released on *habeas corpus.*[3]

It follows, therefore, that the criterion adopted and applied by the Court in the case at bar would seem to have no foundation in either logic or law.

The reasons given in the cases cited are conclusive of the proposition that a court may obtain jurisdiction of a cause and yet make an order therein that is *void,* and, therefore, subject to collateral attack. As above pointed out (b) the Court's opinion herein rests upon the contrary assumption.

Take, for example, the case where an offense is duly and regularly charged, and the defendant has been duly and regularly tried and found guilty in a court having jurisdiction of the cause. There can be no doubt of the authority of the court to hear the cause. And yet, if the offense is punishable only by fine and not by imprisonment, and the latter penalty is imposed, the judgment would be *void* just as if jurisdiction of the cause had never existed.[4]

Another example: Take the case of *Sterrett* v. *Second National Bank,* 248 U. S. 73, 76, as well as the other cases cited on p. 37 of our original brief in opposition to the petition for certiorari herein, where a local court with undoubted jurisdiction of the cause entered an order directing its receiver to bring suit in a foreign juris-

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3. **Hans Nielsen, 131 U. S. 176, 182.**
Ex parte Siebold, 100 U. S. 371.
Ex parte Lange, 18 Wall. 163.
In re Snow, 120 U. S. 274.
In re Coy, 127 U. S. 731, 758.
Sennott's Case, 146 Mass. 489.

4. **Ex Parte Reed, 100 U. S. 13, 23, and cases cited.**

diction. Unquestionably it had the power to determine whether it was authorized to grant the application for leave to sue. Yet the order was a nullity.

Or take the case of proceedings to foreclose a mortgage where service is obtained by publication of summons and a personal judgment is rendered against the defendant;[5] *or the case of an assignment of dower where it includes lands not embraced in the petition for assignment*[6]*; or orders authorizing or confirming the sale of lands by administrators or trustees where the land in controversy was not included in the petition to sell*[7]; or the case where land is ordered sold by an administrator but without any showing that a sale is necessary to pay debts[8]; or the case where in an action on a (mortgage) note for a money judgment only, a judgment of foreclosure is entered.[9] In each of these cases the judgment would be wholly void, and consequently subject to collateral attack, despite the fact that it was made in a cause whereof the court had (general) jurisdiction.

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5. Wood v. Stanberry, 21 Ohio State 142.

6. Falls v. Wright, 55 Ark. 562, 29 Am. St. Rep. 74, 18 S. W. 1044.
   Corwithe v. Griffing, 21 Bart. (N. Y.) 9.
   Seamster v. Blackstock, 83 Va. 232, 5 Am. St. Rep., 2 S. E. 36.

7. Shriver's Lessee v. Lynn, 2 How. 43, 11 L. ed. 172.
   Verry v. McClellan, 6 Gray (Mass.) 535, 66 Am. Dec. 423.
   Townsend v. Gordon, 19 Cal. 188.

8. Heirs of Bishop v. Hampton, 15 Ala. 761, 766.
   Wright v. Edwards, 10 Ore. 298.
   Hays v. McNealy, 16 Fla. 409.
   Kindell v. Titus, 56 Tenn. (9 Baxter) 727, 739.

9. Spoors v. Cowen, 44 Ohio State 497, 9 N. E. 132, 135.

This is true for several reasons. One of these is that courts cannot *ex mero motu* set themselves in motion, nor have they power to decide any questions except those presented by the parties in their pleadings. What is decided within the issues is *coram judice;* anything beyond them is *void.* In other words, general jurisdiction of a controversy is not alone sufficient. It does not give the court a universal license to enter such orders as it pleases. And particular matters that may be determined by a court in a cause whereof it has general jurisdiction are doubly limited. Firstly, *by the general nature of the controversy*[10], and, secondly, *by the issues presented by the pleadings.*

Now let us apply the foregoing principles to the case at bar.[11]

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10. As pointed out by Mr. Justice Field in Windsor v. McVeigh, 93 U. S. 274, 282:

> "If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases."

11. The two petitions filed in the Court of Common Pleas are so essentially different that lumping them together, as this Court did in its opinion herein, cannot fail to result in confusion. We shall take up each petition separately.

Of course, the Court of Common Pleas had general jurisdiction of the controversy presented by the petition of the trustee to foreclose the mortgage. This fact is important, but by no means conclusive. The question is, *what controversy was presented to the court for decision?* As demonstrated in our former briefs herein, the petition showed on its face that the mortgage did not cover all the property of The Struthers Furnace Company, and whether a receiver should be appointed for property not so covered was not presented to the court for decision. It was not an issue that could be determined by the court. And its order appointing a receiver for property not covered by the mortgage was, *pro tanto,* not responsive to the pleadings, but *coram non judice* and void.[12]

The court has failed to pass upon this point directly, or to state all the facts. In its statement the Court says

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12. **Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.**
Hurr v. Davis, 155 Minn. 456, 193 N. W. 943, 194 N. W. 379, petition for certiorari denied, 263 U. S. 709, writ of error dismissed, 267 U. S. 572.
Spoors v. Cowen, 44 Ohio State 497, 9 N. E. 132.
Remington v. Superior Court, 69 Cal. 633, 11 Pac. 252.
Waterman v. Lawrence, 19 Cal. App. 753, 218 Pac. 61.
Knopf v. Morel, 111 Ind. 570, 13 N. E. 51.
Williams v. Childress, 25 Miss. 78.
State ex rel. McManus, 217 Mo. 124, 117 S. W. 25.
Banking House, etc. v. Dukes, 70 Neb. 648, 97 N. W. 805.
Edinburg Irr. Co. v. Ledbetter, (Tex.) 247 S. W. 335.
Strobe v. Downer, 13 Wis. 10.
State v. Molly, 18 Iowa, 525.
Eames v. Northumberland, 44 N. H. 67.

that the trustee prayed that a receiver be appointed to take charge of the "property of the defendant," (p. 2), and apparently some reliance is placed upon the prayer of the trustee. However, in our supplemental brief (p. 16) we cited decisions by the Supreme Court of Ohio in support of the universal rule that a prayer is no part of the issues to be tried, and cannot authorize relief not warranted by the facts pleaded.[13] Manifestly, this point should not be ignored by the Court, and, clearly, to say that the Common Pleas Court has jurisdiction of the petition is to stop short of the *crucial* point in the case. It had (general) jurisdiction, yes, but *not* jurisdiction to appoint a receiver for property not covered by the mortgage. That question was not presented by the pleadings.

Since the order appointing Grant receiver for property not covered by the mortgage was, *pro tanto,* void, it necessarily follows that Grant cannot sue Leach & Co. even though he was ordered to do so by the Court of Common Pleas. The claim asserted by the receiver against Leach & Co. "was a chose in action of the Furnace Company," (Opinion, p. 5), which was not, of course, covered by the mortgage, neither was it ever assigned by the Struthers Company to the receiver, who does not take title even to property of which he is lawfully appointed receiver.[14] If the order appointing him

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13. **To which may be added:**
Petition of Furness, 62 Cal. App. 753, 218 Pac. 61.

14. **Lafayette Bank v. Buckingham, 12 Ohio St. 419.**
Morley v. Cleveland Hippodrome Co., 23 Ohio C. C. (N. S.) 295, 297.
1 Tardy's Smith on Receivers (2nd ed.) § 338, p. 845.

receiver of this chose in action was void, then, of course, neither the Court nor the receiver could thereafter take any lawful action concerning it, particularly so far as its enforcement is concerned.

This Court says that section 11897 of the General Code of Ohio provides that the court may authorize a receiver to sue, etc., and that

> "under this provision the Common Pleas Court had jurisdiction to determine what actions the receiver might bring." (P. 6.)

Manifestly, the authority granted by section 11897 is limited, not only by the general nature of the proceedings in which the receiver is appointed, but to cases concerning property of which he had lawfully been appointed receiver. It certainly would not include power to authorize the enforcement of a chose in action in a case where the pleadings did not authorize the court to appoint a receiver of it.[15] A court always has jurisdiction for cer-

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15. In simple foreclosure proceedings against a corporation, § 11897 would hardly justify an order directing the receiver to sue the corporation defendant on a claim held against it by a simple-contract creditor. An order directing the receiver to bring suit to enforce a purely personal claim of a bondholder against Leach & Co. would likewise be void. Also in foreclosure proceedings against a person, an order directing the receiver to institute proceedings for separate maintenance in behalf of the defendant's wife, would be a nullity. The order directing the receiver to sue Leach & Co. on a chose in action not covered by the mortgage, and of which Grant was never lawfully appointed receiver, is equally void.

tain purposes only.[16] And this is particularly true of simple foreclosure proceedings.

And here it should be pointed out that Section 11894 of the Ohio Code (Appendix, p. 34, *infra*) provides for the appointment of receivers in a great many other cases than mortgage foreclosure proceedings. Consequently the power granted the court (by Cection 11897, p. 35, *infra*) to authorize the institution of suits by receivers is *necessarily* limited by the *nature of the proceedings* in which the receiver was appointed, no less than by the issues presented for decision.

The power of the Common Pleas Court was limited, then, by the general nature of the proceedings, which were instituted solely for the purpose of foreclosing a mortgage. Insolvency was not alleged; a winding up of The Struthers Furnace Company was not sought. Indeed,—and this important fact was not stated by this court,—the petition expressly alleged that *all the bonds were duly issued for a valuable consideration in accordance with the terms of the mortgage; that all bonds were then outstanding in the hands of various persons and corporations, who were the owners and holders thereof for value, and that all the bonds were in all respects valid and outstanding obligations of the defendant.* (R. 238.)

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16. **Wood v. Stanberry, 21 Ohio State 142.**

Boswell v. Dickerson, 4 McLean 262.

Fithian v. Monks, 43 Mo. 502.

As said in Williamson v. Berry, 8 How. 495, 543:

"Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment."

The very action in which an erring court appointed this knight-errant receiver was predicated upon the valid issuance of *all* the bonds. The very purpose of the suit was to procure the payment of all the bonds. Unlike a receiver appointed in many other cases, a receiver appointed in simple foreclosure proceedings is an indifferent stakeholder, who merely conserves and manages the mortgaged property and the fruits thereof. Neither he nor the court is concerned with anything else. The court's power is limited to ascertaining the amount due under the mortgage, preserving the mortgaged assets, selling them if necessary, and applying the proceeds. That is all that it has the power to do. Its power to enter orders in the case is necessarily limited not only to the issues presented by the pleadings, but by the nature and purpose of the proceedings. In a winding-up proceeding, where insolvency, fraud, etc., were alleged, of course, the court could order its receiver to institute suits where the rights of creditors or others had been infringed.

But here, the petition does not show that there were any creditors other than bondholders. Insolvency was not alleged. The valid issuance of all bonds was the bedrock upon which the court's jurisdiction was predicated. The invalidity of not one bond was an issue in the case. And how could the court have jurisdiction to order this mere stakeholder to attack the contract pursuant to which all the bonds had been issued? The order entered by the court was entirely beyond the scope and purpose of the proceeding and wholly void. It was contrary to the jurisdiction conferred upon the court by the allegations of the petition, by which all subsequent action was limited, as is shown by the cases cited on pages 9-12, *supra*.

On page 6 of the opinion herein it is said:

> "This action against Leach & Co.,—involving in effect the claim of an illegal taking of a large amount of the Company's bonds, which if recovered would reduce the amount of the mortgage lien—came, we think, fairly within the terms of the statute as an act respecting property in the custody of the court in the trustee's suit."

We respectfully submit that whether or not the action, if successful, would reduce the amount of the mortgage lien, is irrelevant. Speculation in the stock market with the proceeds of mortgaged assets would also, if successful, reduce the amount of the mortgage lien. Obviously, the test suggested by the court is a fallacious one. It is a question of *lawful authority,* not of *results.* And the order entered by the Court of Common Pleas is condemned by the law, just as conversion of trust funds is condemned by ethics regardless of its enrichment of the wrongdoer.

Moreover, this Court's very statement of the test above quoted conclusively shows that the action is *hors* the scope of the petition to foreclose. Indeed, the former is squarely opposed to the latter, since the petition expressly alleged that *all* the bonds had been lawfully issued and were valid claims against the corporate defendant. The petition was never amended, and, so far as the record shows, the corporate defendant never, either by answer or by proof, disputed or attempted to controvert the allegations of the petition.

Furthermore, we submit with great respect, this Court's statement of the test will not bear analysis. The only *property in custody* of the Court of Common Pleas was the *property covered by the mortgage.* The action against Leach & Co. was on a chose in action that was

not covered by the mortgage. Consequently the action could not be "an act respecting property in the custody of the court." Surely, this Court does not mean to imply that the *bonds* were in the custody of the Court of Common Pleas. And certainly not the *mortgage lien.*

In support of its conclusion that the order directing the receiver to sue is not subject to collateral attack the Court cites

Sanger v. *Upton, Assignee,* 91 U. S. 56, 58.

We respectfully submit that the case is readily distinguishable. That case concerned the power of an assignee in bankruptcy to collect the balance due on a subscription to the capital stock of the corporate bankrupt. The bankruptcy court had entered an order directing the assignee to sue all stockholders who refused to pay. Plaintiff in error contended that she was not bound by the order since at the time it was entered "she was not before the court." (P. 57.) This Court pointed out that

> "in view of the law she was before the court in all the proceedings touching the body of which she was a member." (P. 59.)

This Court also pointed out that

> "by the deed of assignment, all the property and effects of every kind, which belonged to the company when the petition to have it declared bankrupt was filed, passed to the assignee. Bump on Bankruptcy, 473, 478; Rev. Stat. sect. 5044. * * The statute in terms gave him the same right in any litigation he might institute which the bankrupt would have had 'if the decree in bankruptcy had not been rendered, and no assignment had been made.' Id. sect. 5047; Bump on Bank. 528. The liability of the plaintiff in error, and the right and title of the company, were legal in their character. If the company had sued, it might have sued at law. The rights of the company passed to the assignee, and he also could

enforce them by a legal remedy. The assignee was subrogated to all the rights, legal and equitable, of the bankrupt corporation. This suit was, therefore, well brought in the form adopted. *Hall* v. *U. S. Ins. Co.*, 5 Gill. 484."

The differences between bankruptcy proceedings and a simple foreclosure suit are both numerous and vital. In the former the rights of creditors of all kinds, stockholders, etc., are involved in proceedings where all questions are open either to adjudication or investigation. The assignee had title in that case, and the order directing him to sue was wholly supererogatory. The stockholders, creditors, and all other persons were bound to take notice of bankruptcy proceedings, and what would bind the corporation would of course bind its privies, the stockholders. Moreover, the stockholder in that case "might have applied to the District Court to revoke or modify the order. Had she done so, she would have been entitled to be heard; but it does not appear that any such application was made." (P. 59.)

So far as the claim against Leach & Co. is concerned there was no privity between The Struthers Furnace Company and Leach & Co. *Leach & Co. was not a party to the proceedings, had no notice of them, and would have had no standing in the Court of Common Pleas to move that the order directing suit be modified or revoked.* The receiver in the case at bar had no title even to the assets lawfully seized by him. The rights of general creditors were not before the court. It was not alleged that the corporation was insolvent, neither was the court asked to wind it up. Necessarily the jurisdiction of the Court of Common Pleas, in view of the nature of the foreclosure proceedings, was much more restricted than the jurisdiction of the bankruptcy court in the case above mentioned.

Therefore, we respectfully submit not only that the case cited by this Court is not in point, but that the excerpt from it, appearing in this Court's opinion in the case at bar, does not give an accurate idea of what the case really holds.[17] The omitted matter which is indicated by the *points suspensifs* in the excerpt set forth in the margin is a reference to Revised Statutes, § 4972. This section and §§ 5046-47 are set forth in the Appendix, pp. 33-4, *infra*.

So that the case is distinguishable not only because of the greatly circumscribed jurisdiction of the Court of Common Pleas, but because the stockholder in that case was, if not a party, at least privy to the judgment,[18]

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17. "The order was conclusive as to the right of the assignee to bring the suit. Jurisdiction was given to the District Court by the Bankrupt Act . . . to make it. It was not necessary that the stockholders should be before the court when it was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons, she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose."

18. Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1074, 31 Sup. Ct. Rep. 625.

Glenn v. Leggett, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867.

Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739.

Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 371, 54 L. ed. 1074, 31 Sup. Ct. Rep. 67.

whereas, Leach & Co. was neither party nor privy to the proceedings in the Court of Common Pleas. As stated in 1 Freeman on Judgments (5th ed.), § 318, p. 633:

> "While parties and privies may attack a judgment for lack of jurisdiction, this right, in most states, is restricted to cases where the judgment is void on its face. But strangers are not bound by this limitation and may offer evidence to show the absence of jurisdiction. A decree awarding relief entirely beyond the scope and subject matter of the complaint, being void, may be collaterally impeached by a stranger whose rights are affected."

This is the law in Ohio. (*Coe.* v. *Erb,* 59 Ohio St. 259, 268.)

Of course, the cases cited on p. 6 of this Court's opinion in support of the proposition that where a court *has* jurisdiction to appoint a receiver the validity of the appointment cannot be inquired into in collateral proceedings, do not meet the respondent's contentions. Consequently these cases need not be noticed, except to remark that, obviously, there is nothing sacrosanct about the appointment of a receiver. Like any other order or judgment, an order appointing a receiver may be collaterally attacked when the court *lacks* jurisdiction.

We respectfully submit that the Court of Common Pleas was without power to seize property not covered by the mortgage, and that the order directing the receiver to sue Leach & Co. was wholly void.

Before discussing the jurisdiction of the Court of Common Please in the stockholder's suit, let us first notice another very important matter.

III.

We respectfully submit that this court departed from the issues joined in the Circuit Court of Appeals, and failed to give effect to the stipulation of the parties in that court.

Concerning the appointment of the receiver this Court says that

> "its validity was not challenged in any respect by the answer of Leach & Co. in the District Court, which admitted that Grant had been 'duly appointed' receiver of all the Company's property." (P. 6.)

Now consider the position of Leach & Co. when the Circuit Court of Appeals notified the parties that it would be inclined to remand the cause, and invited counsel to consider whether the rights of their clients might properly be preserved by means of a stipulation for the filing of a transcript of the record in the Court of Common Pleas *and* the argument of the *specific questions* stated by the Court. (R. 266-7.)

Surely, it will not be asserted that in case of remandment Leach & Co. could not have obtained leave to amend its answer. But, clearly, in view of the statement contained in the Court's letter,[19] there was no need of insist-

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19. "The further argument desired will be devoted to the question whether authority to bring this suit either was or could be conferred upon the receiver, and be rightly based upon the pleadings, in connection with the controlling statutes and equitable principles, and whether such authority would or would not be rightly incidental to and consistent with the nature and purposes of his possession of those assets which passed to the receiver." (R. 267.)

ing upon remandment. All parties understood that the *validity* of the proceedings in the Court of Common Pleas, regardless of the record made in the District Court, would be considered by the Circuit Court of Appeals in the event that the parties entered into a stipulation and filed a transcript of those proceedings. We respectfully submit that the Court's letter is not subject to any other construction.

Moreover, both parties entered into the suggested stipulation and filed briefs addressed to whether or not the orders entered by the Court of Common Pleas were valid. Our position has been consistent from the first, as is evidenced from the matter set forth in the margin,[20]

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20 IV.

In simple foreclosure proceedings the power of a court to appoint a receiver is necessarily limited to the appointment of a receiver for the mortgaged property.

The alleged claim of The Struthers Furnace Company against Leach & Company under the contract of April 5, 1922, pursuant to which the bonds secured by the mortgage sought to be foreclosed were sold, necessarily was not a part of the mortgaged property.

The State Court was therefore without jurisdiction to direct the receiver to sue Leach & Company on the alleged claim.

V.

The rights of neither creditors nor stockholders were involved or could be involved in the foreclosure suit, consequently the prosecution of any suit against Leach & Company is wholly foreign to and inconsistent with not only the foreclosure suit, but the Receiver's possession of the mortgaged assets. A receivership in foreclosure proceedings is entirely different from a receivership for winding up a corporation or in other suits which require a liquidation of a corporation's assets.

which, on our honor as members of this bar, we certify is a copy of certain points that appear in Leach & Co.'s brief filed in the Circuit Court of Appeals after the stipulation was entered into.

We respectfully submit, therefore, that this Court should confine itself to the record made in the Circuit Court of Appeals, and that its failure to do so violates the spirit of the rule so well stated by a member of this Court when a member of another court:

> "The receiver agreed with the sheriff that his taking possession should not affect the validity of any lien which might have been created by the sheriff's levy and continued in force until the receiver's taking possession. The arrangement made by the sheriff and the temporary receiver is to be commended. It was a judicious compromise to avoid a conflict between jurisdictions, and certainly this court will not permit the commendable spirit of confidence which the sheriff showed in the justice and equity of this court to be made a ground for depriving him or those whom he represented of the rights in the property which had been acquired and maintained by lawful levy and subsequent official custody." *Vance* v. *Manufacturing Co.*, 82 Fed. 251.)

Moreover, Leach & Co. in the District Court, *had put in issue* the power of the receiver to sue. (Opinion, p. 4.) Surely, this Court will not say that the issue in the Circuit Court of Appeals after the stipulation was limited to whether the Court of Common Pleas had actually entered an order authorizing the suit against Leach & Co. We *stipulated* that the order had been entered. And how can the *validity* of the order be determined if we are to be told that the validity of Grant's appointment as receiver was not challenged in the District Court and that

we there admitted that Grant had been duly appointed receiver of all the Company's property? Obviously, that is not to determine the *validity* of the order directing Grant to sue, but to decide that its validity is *not an issue.* It is to disregard the letter of the Circuit Court of Appeals, or else to convert it into mere jugglery of words, after our reliance on it. It is to pass upon issues here other than those joined in the Circuit Court of Appeals.

IV.

The court of common pleas was without jurisdiction of the subject-matter of the stockholder's suit, which was solely for the appointment of a receiver, and the order appointing a receiver therein was coram non judice and void.

This court's decision herein, we submit with great respect, is based upon a misconception of what constitutes jurisdiction, an inadvertent misstatement of respondent's contention, and cases that have practically been overruled. It is contrary to the Ohio decisions, numerous decisions by this court, and the overwhelming weight of authority.

On pages 5-6 of the opinion herein the Court states that

> "it is asserted that under the petition of the preferred stockholder, in which no other relief was prayed, the appointment was *erroneous,* under the decisions of the Ohio courts. But, however, this may be, the court had jurisdiction and the power to determine these questions." (Italics ours.)

As a reference to p. 17, *et seq.,* of our original brief in opposition to the petition for certiorari herein will

show, the Court has inadvertently misstated the contention of respondent, and in such a way that it constitutes a reflection upon either their good faith or professional ability. No lawyer would contend that a merely *erroneous* judgment is subject to collateral attack. The excerpt from page 20 of our original brief[21] clearly indicates our position.

This Court in *Reynolds* v. *Stockton,* 140 U. S. 254, approved the following definition of *jurisdiction:*

> "Jurisdiction may be defined as the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of *the class of cases* to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue." (Italics ours.)[22]

Now, we ask, to *what class* of cases does the stock-

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21. "The Court was wholly without jurisdiction of the subject matter and all that it did in said so-called suit was coram non judice and void.

15 Corpus Juris, p. 853.

Where there is an absence of jurisdiction, not even the consent of all parties in interest can confer it.

1 Tardy's Smith on Receivers (2nd. ed.), p. 63."

22. See also:

Charles v. White, 214 Mo. 187, 112 S. W. 545, 549.

State ex rel. McManus v. Muench, 217 Mo. 124, 117 S. W. 25, 29.

and the other cases cited in our Supplemental brief, p. 23 et seq.

holder's suit belong? The answer is that a suit *solely* for the appointment of a receiver is unknown to the law. The answer is that where a court is without power to grant the ultimate relief sought, it has no power to appoint a receiver, and that, if it does, its order is absolutely *void* and, therefore, subject to collateral attack whenever it is thereafter relied on for any purpose. The cases leave no room for doubt on this point, as we shall soon demonstrate.

In 1 Tardy's Smith on Receivers, § 14, p. 51, it is said:

> "The pending action must be one for such relief as can be litigated between the parties even if the application for the appointment be denied. Hence if the sole object of the suit is the appointment of a receiver, the court will not take jurisdiction in the absence of statutory provisions allowing such suits. The court must have jurisdiction to entertain the cause of action to which the appointment of the receiver would be ancillary and have power to grant the relief demanded in the action, for if the court has no jurisdiction over the subject matter it has no authority to appoint a receiver, since it is fundamental that *there is no such proceeding in equity as a plain receivership action, in which the appointment of a receiver is the only desideratum. The action must, of course, be one which comes within the equitable jurisdiction of the court and the relief prayed for must be of such a character as to be germane to the cause of action set up.*
>
> *In order to constitute a suit as pending within the above rule it is necessary that the complaint or bill shall state a cause of action against the defendant.*" (Italics ours.)

In this Court's opinion herein it is said that section 11894 provides that the Common Pleas Court may appoint a receiver "in causes pending therein in certain designated cases, and '6. In all other cases in which re-

ceivers heretofore have been appointed by the usages of equity.'" (P. 5.)

But the appointment of a receiver is purely *ancillary. The usages of equity have never sanctioned the appointment of a receiver where that is the ultimate and only relief sought.* And the Ohio decisions cited in our original brief in opposition to the petition for certiorari herein demonstrate that this universal rule is followed in Ohio. There is, therefore, no *class of cases* to which this stockholder's suit belongs. The Court of Common Pleas did not have "cognizance of the *class of cases* to which the one to be adjudged belongs."

Moreover, there was no cause pending in the Court of Common Pleas, as provided by section 11894 of the Ohio Code. The plaintiff alleged no breach of duty or other wrongful act; and, so far as the record shows, his petition was never thereafter amended. Indeed, there was nothing to amend by. As said by the Supreme Court of Ohio in *Spoors* v. *Cowen,* 44 Ohio State 497, 9 N. E. 132, 135:

> "But, in order that a party may be permitted to amend, there must be something to amend by (*Shamokin Bank* v. *Street,* 16 Ohio St. 10); so, unless a case is presented that could be amended, there is no case upon which a judgment can be rendered. A judgment rendered, where no case has been stated, is as much a judgment upon a case *coram non judice,* whatever may be the jurisdiction of the court rendering it, as a judgment upon a case, however perfectly stated, before a court not clothed with jurisdiction to hear and determine it."

In

Blanchard Bro. & Lane v. *The S. G. Gay Co.,*
289 Ill. 413,

a stockholder of a corporation filed a bill for the ap-

pointment of a receiver. No fraud or mismanagement was alleged. A receiver was appointed, and in a *collateral attack* the appointment was held absolutely *void.* The Supreme Court said:

> "The court clearly had no jurisdiction by reason of the allegations of the bill, all of which are above set forth to appoint a receiver to take charge of and distribute the assets. * * * The court having no jurisdiction to entertain the bill and to appoint a receiver with the powers aforesaid, the decree was void and the receiver acquired no title to any of the property and therefore could convey no title. (*Fitch* v. *Wetherbee,* 110 Ill. 475.) The decree being absolutely void was open to collateral attack. (*People* v. *Weigley, supra.*) In any judicial sale by the receiver the rule of *caveat emptor* must be applied. *Hutson* v. *Wood,* 263 Ill. 376; *Manternach* v. *Studt,* 240 id. 464."

See also

Taylor v. *Exnicious,* 197 Cal. 443, 241 Pac. 397.

In

People v. *Weigley,* 155 Ill. 491,

a case very similar to the one in the case at bar, cited in the quotation above, the Supreme Court of Illinois held that where a court was without power to grant the ultimate relief prayed for it had no power to appoint a receiver; that the appointment was a nullity, and that one who interfered with the possession of the receiver could not be punished for contempt of court.

Neither the Ohio Code nor the usages of equity authorize the appointment of a receiver in a suit by a stockholder where that is the sole and ultimate relief sought and no breach of duty or other wrongful act is alleged. The appointment of a receiver in these circumstances is as void as the granting of letters testamentary on the estate of a living person, or an order undertaking to con-

trol the official discretion of the chief executive of a State or Nation. In

Jones v. *Schaff Bros. Co.*, 187 Mo. App. 597, 174 S. W. 177,

a receiver had been appointed on the voluntary application of an insolvent corporation. The appointment and all orders entered were held to be void in a *collateral attack* on them. The Court said:

> "The appointment of a receiver is not the ultimate end and object of a suit. The court cannot appoint a receiver upon the ex parte application of the corporation itself. There must be a proceeding pending. * * * So that there is no known statutory authority given a court to appoint a receiver upon the mere ex parte application of an insolvent corporation to take charge of and manage its affairs. And a court of equity has no inherent power to appoint such receiver except as an incident to and in a pending suit. [Citing cases.] * * * Consequently the circuit court was without jurisdiction to appoint a receiver, and its order, as well as everything done in the alleged receivership, was void and can be impeached even in a collateral proceeding. [Citing authorities.]"

See also:

Jones v. *Bank of Leadville*, 10 Colo. 464, 17 Pac. 272.

Whitney v. *Hanover National Bank*, 71 Miss. 1009, 15 So. 23.

Texas, etc. Railroad Co. v. *Gay*, 86 Tex. 604, 26 S. W. 599.

State ex rel. Merriam v. *Ross*, 122 Mo. 435, 25 S. W. 947.

Lewis v. *Shaw*, (Cal.) 246 Pac. 86.

Bibby v. *Dieter*, 15 Cal. App. 45, 113 Pac. 874.

We respectfully submit that the cases cited on page

6 of the opinion herein are clearly not in point. Surely not the case of

Barbour v. *National Exchange Bank,* 45 Ohio State, 133,

where the holding of the Court was as stated in the syllabus set forth in the margin.[23]

The case of

McNary v. *Bush,* 35 Ore. 114,

is merely a decided case that is patently wrong, and has since been practically overruled, or at least reduced to an absurdity. In

Cook v. *Leona Mills Lumber Co.,* 106 Ore. 521,

the Supreme Court reviewed the authorities and reached the following conclusion:

> "Under our Code the appointment of receivers is an ancillary remedy, in aid of the primary object of litigation, and such relief must be germane to the principal suit, and *a proceeding cannot be maintained where the appointment of a receiver is the*

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23. "1. S. was surety of an insolvent manufacturing corporation for the payment of a large amount of overdue indebtedness. The corporation was making no effort to pay its debts. Its business could not be continued without loss and wasting of its assets. The sale of its property and collection of its accounts were necessary to the payment of its debts. S. brought his action under section 5845 of the Revised Statutes, to compel it to pay the indebtedness upon which he was surety, by subjecting its property to such payment. Held: The appointment of a receiver of the property of the corporation was authorized by section 5587 of the Revised Statutes."

> *sole primary object.* Neither at law nor in equity is an action permissible in which only the appointment of a receiver is sought.
>
> From the face of the petition it clearly appears that the receivership was the aim and object of this suit and was not ancillary to any relief sought or prayed for in the complaint. *Hence, the pleading failed to give the court jurisdiction to appoint the receiver.*" (P. 530-1.) (Italics ours.)

This is necessarily so. For if there is no such action known either to law or to equity, it must follow that the court does not have cognizance of that *class of cases.* And if the court does not, then *jurisdiction* of the subject matter does not exist. The fact that in the case above cited there was a direct attack upon the order appointing the receiver is manifestly irrelevant.

The decisions relied on by the court in *McNary* v. *Bush,* 35 Ore. 114, have since been questioned and practically overruled by the court that rendered them. See

> *State* v. *Union Nat. Bank,* 145 Ind. 537, 44 N. E. 585, 588.

We respectfully submit, therefore, that the decision of this Court on the point under consideration is not in accord with legal principles or the decided cases.

V.

The court's decision that the receiver in the case at bar did not sue in a foreign jurisdiction is based upon a misapprehension of the facts, and is, we submit, erroneous.

We respectfully submit that the fact that the receiver was directed to sue in "a Federal Court within Ohio, and having jurisdiction in territory within which the Common Pleas Court itself was located" (Opinion, p. 7) is irrelevant. This Court accepts the principle that a receiver has "no extra-territorial power of official action." (P. 7.) This is because the court appointing him has none. Obviously, therefore, the test is not the territorial jurisdiction of the court in which suit is brought, *but the territorial jurisdiction of the court that appointed the receiver.*[24]

The territorial jurisdiction of the Common Pleas Court is limited to the county in which it sits. (Throckmorton's Ohio Code (1929), § 1532. *Wilmot* v. *Cole,* 10 O. D. 77, 23 B. 339.)

We also respectfully submit that equally irrelevant is the fact that no *administration* of the property within the District Court was sought, as the cases cited in our Original brief, (p. 37), show.

The question presented by us in the case at bar was not raised in *Shields* v. *Coleman,* 157 U. S. 168, nor in *Harkin* v. *Brundage,* 276 U. S. 36. Clearly, there is an essential difference between instituting an independent

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24. Texas, etc. Railroad v. Gay, 86 Tex. 604, 26 S. W. 599, and cases cited in our Original brief, p. 37.

suit, and making a motion in a pending suit concerning property in the court's possession, particularly where there is a conflict of jurisdiction. If another court has exclusive jurisdiction, then it is the duty of the latter court to surrender the property to the agent of the other court. Moreover, in the *Harkin* case, *both* courts sat in Cook County.

It is also a fact that in *Shull* v. *Fidelity & Guaranty Co.*, 81 W. Va. 184, the Federal receiver instituted the suit within the *territorial jurisdiction* of the court that appointed him. (Judicial Code, § 194.)

We respectfully submit that *territorial* jurisdiction is, in any event, irrelevant. It is a mere incident in one type of case. The key to the whole situation is that *a person without title must seek the aid of another court, which has not only the power but the duty of determining who shall sue, and what shall be done with the fund in the event of a recovery.* (See our original brief.)

In conclusion it is with deference submitted that a rehearing should be granted.

Respectfully,

EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
HENRY JACKSON DARBY,

Attorneys for A. B. Leach & Co., Inc., above named respondent.

We, the undersigned counsel for the respondent, A. B. Leach & Co., Inc., hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
HENRY JACKSON DARBY.

APPENDIX.

Revised Statutes of the United States (1873-74) Second Edition 1878:

"Sec. 4972. The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend:

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interests of all parties.

Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors.

Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

"Sec. 5046. All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bank-

rupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee."

"Sec. 5047. The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt."

OHIO CODE.

Sec. 11894. "Appointment of Receiver. A receiver may be appointed by the supreme court or a judge thereof, the court of appeals, or a judge thereof, in his district, the common pleas court or a judge thereof in his district, or the probate court, in causes pending in such courts respectively, in the following cases:

1. In *an action by a vendor to vacate a fraudulent purchase of property,* or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probably, and when it is shown that the property

or fund is in danger of being lost, removed or materially injured;

2. In *an action by a mortgagee, for the foreclosure* of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

3. After *judgment, to carry the judgment into effect;*

4. After *judgment, to dispose of the property according to the judgment,* or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

5. In the cases provided in this title, and by special statutes when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. *In all other cases in which receivers heretofore have been appointed by the usages of equity.''*

Sec. 11897. Powers of Receiver. *Under the control of the court,* the receiver *may* bring and defend actions in his own name, as receiver, take and keep *possession* of the property, receive rents, *collect, compound for, and compromise demands, make* transfer, and generally do such acts respecting the property *as the court authorizes.''*

FILE COPY

SEP 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 9.

HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY,
Petitioner,

vs.

A. B. LEACH & COMPANY,
Respondent.

MOTION OF HUGH W. GRANT, TRUSTEE IN BANKRUPTCY TO INTERVENE AS PARTY PLAINTIFF.

J. P. WILSON,
Youngstown, Ohio,
Counsel for Hugh W. Grant, Trustee in Bankruptcy.
A. M. HENDERSON,
Youngstown, Ohio,
Counsel for Hugh W. Grant, Trustee in Bankruptcy.
DAVID F. KENNEDY,
Youngstown, Ohio,
Of Counsel.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 9.

HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY,

Petitioner,

vs.

A. B. LEACH & COMPANY,

Respondent.

MOTION FOR LEAVE TO INTERVENE AS PARTY PLAINTIFF.

May it Please the Court:

The undersigned, as counsel for Hugh W. Grant, trustee, respectfully moves this Honorable Court for leave to intervene in this case as party plaintiff for the following reasons:

1. The Struthers Furnace Company was adjudicated

a bankrupt on the eighteenth day of April, 1927, by the District Court of the United States at Cleveland, Ohio.

2. This applicant was appointed trustee in bankruptcy on the tenth day of July, 1929.

3. Although some question is made of the right of the petitioner to bring this action, it must be conceded that a right of action exists in either the receiver or in this trustee for the benefit of creditors as well as stockholders.

4. The rights, obligations and duties of the state court receiver and the trustee in bankruptcy are identical for the purposes of this suit.

5. The intervention of your applicant as a party plaintiff in this suit will avoid a multiplicity of suits and will obviate the necessity of instituting an original action in the event that it should be held that the state court receiver had no authority to institute this action.

6. Your applicant believes that the receiver has a meritorious cause of action and that the conduct of the company was unlawful and fraudulent as to the creditors and stockholders of the company.

Certified copies of the application filed in the United States District Court by the trustee seeking leave to file a motion to intervene in this suit, together with order of the court thereon, are attached hereto, marked "Exhibit A" and "Exhibit B."

It is therefore respectfully requested that an order be

entered granting your applicant leave to intervene as a party plaintiff and leave to file a brief on the merits.

Respectfully submitted,

JAMES P. WILSON
A. M. HENDERSON
.....,

Counsel for Hugh W. Grant, Trustee.

.....,

Of Counsel.

I, A. M. Henderson, counsel for the motioner in the above entitled cause, do solemnly swear that the facts recited in the foregoing "motion to intervene" are true to the best of my knowledge and belief.

A. M. HENDERSON
.....,

Counsel for Hugh W. Grant, Trustee.

Sworn to and subscribed before me this ...13th... day of September..., 1929.

KNOWLES WYATT
.....,

Notary Public.

"EXHIBIT A."

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 13419 in Bankruptcy — In the Matter of The Struthers Furnace Company, a Corporation, Bankrupt.

Application of Trustee to Intervene in Suit.

(Filed August 22, 1929.)

Now comes Hugh W. Grant and respectfully represents to the court that he is the duly appointed, qualified and acting trustee in bankruptcy in the above entitled matter, having been so appointed by one Paul E. Carson, referee in bankruptcy, on July 10, 1929. Further, your petitioner represents that on the fifth day of August, 1925, he was the duly appointed, qualified and acting receiver of The Struthers Furnace Company, having received his said appointment from the Court of Common Pleas of Mahoning county, Ohio, on the twentieth day of January, 1925; that in pursuance of and in conformity with the order of the said state court of Ohio he instituted, on the said August 5, 1925, in the Court of Common Pleas of Mahoning county, Ohio, a suit against A. B. Leach & Company, Inc., seeking to compel the said defendant to surrender and deliver back to The Struthers Furnace Company certain bonds of The Struthers Furnace Company which had been delivered to the said A. B. Leach & Company, Inc., in exchange for preferred stock of the company and without other consideration, which said transaction he alleged to be unlawful and in fraud of the rights of the other stockholders.

Your petitioner further represents that said suit terminated in his favor and that this court as of March 8, 1926, entered judgment upon its journal in favor of the plaintiff against said A. B. Leach & Company, Inc., in the sum of $312,375.00; that upon this judgment an appeal was allowed and perfected as of April 21, 1926, which said appeal resulted in a reversal of the judgment of this court by the Circuit Court of Appeals of the United States sitting at Cincinnati in a judgment entered as of July 11, 1928. Your petitioner now represents that said suit is pending in the Supreme Court of the United States upon a writ of certiorari and is docketed in that court under case No. 479, and that there is a serious question raised as to his right as a state receiver to have originally brought the said action; that he believes that the cause as stated in the petition is just and meritorious; that he believes that the rights and duties of the state receiver and of the trustee in bankruptcy are identical for the purposes of this suit; that it is to the interest of the creditors of this bankrupt company to secure a reversal of the judgment of the United States Court of Appeals and an affirmance of the judgment of this court, and lastly your petitioner believes that he is a proper party plaintiff in this action; that he should be joined as party plaintiff with the receiver so that the question of the authority of the state court receiver to bring this action may be removed, to the end that this cause may be heard upon its merits in furtherance of equity and justice.

Wherefore, your petitioner prays that an order be en-

tered granting leave to him to file a motion in the Supreme Court of the United States asking leave to become a party plaintiff in the said suit by intervention.

Respectfully submitted,

Hugh W. Grant,
Trustee.

The United States of America, Northern District of Ohio, ss.:

I, B. C. Miller, clerk of the District Court of the United States, within and for said district, do hereby certify the foregoing to be a true copy of the application for leave to become a party plaintiff in the above entitled cause in said court, and that the same is correctly copied from the original now on file in my office.

Witness, my official signature and the seal of said court, at Cleveland, in said district, this twenty-sixth day of August, A. D. 1929 and in the 154th year of the Independence of the United States of America.

B. C. Miller,
Clerk,

[Seal.]

By Warner B. Ragatz,
Deputy Clerk.

"EXHIBIT B."

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 13419 in Bankruptcy — In the Matter of The Struthers Furnace Company, a Corporation, Bankrupt.

Journal Entry.

(Filed August 22, 1929.)

This day this matter came on for hearing upon the application of the trustee for an order granting leave to file a motion in the Supreme Court of the United States in case No. 470 for leave to intervene as party plaintiff, and the court being fully advised in the premises finds that the representations of the petitoner are true and that the prayer should be granted.

It is therefore ordered that the petitioner proceed to make application in the Supreme Court of the United States for leave to become a party plaintiff by intervention in cause No. 479.

S. H. West,
Judge of the District Court of the United States.

The United States of America, Northern District of Ohio, ss.:

I, B. C. Miller, Clerk of the District Court of the United States, within and for said district, do hereby certify the foregoing to be a true copy of the order granting leave to become a party plaintiff in the above entitled cause in said court, and that the same is correctly copied from the original now on file in my office.

Witness, my official signature and the seal of said court, at Cleveland in said district, this twenty-sixth day of August, A. D. 1929 and in the 154th year of the Independence of the United States of America.

B. C. Miller,
Clerk,
By Warner B. Ragatz,
Deputy Clerk.

[Seal.]

RECTED COPY

PREME COURT OF THE UNITED STATES.

No. 9.—October Term, 1929.

h W. Grant, Receiver of the ruthers Furnace Company, Petiner,
vs.
A. B. Leach & Company, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 6, 1930.]

Mr. Justice Sanford delivered the opinion of the Court.

rant, a citizen and resident of Ohio, was appointed by the mon Pleas Court of Mahoning County in that State, receiver he property and assets of the Struthers Furnace Co., an Ohio oration. Thereafter, pursuant to an order of that court so cting, he brought this suit in equity against Leach & Co., a New k corporation, in the Federal District Court for the Eastern ision of the Northern District of Ohio,[1] to recover certain mort- bonds of the Furnace Company, or their value. The District rt gave decree in favor of the Receiver. The Circuit Court of eals vacated this decree and dismissed the suit, on the ground it was beyond the power of the Common Pleas Court to author- he Receiver to bring it. 27 F. (2d) 201.[2]

[1] Mahoning County is included in the Eastern Division of the Northern Dis- and a stated term of the District Court is held therein.

[2] The record here consists in part of copies of orders and proceedings in Common Pleas Court, which were filed in the Circuit Court of Appeals, for onsideration, pursuant to a stipulation of the parties. The Circuit Court of eals, after stating that no issue had been made in the evidence in the rict Court as to the receiver's authority to bring the action, said: "We rred not to decide it upon a construction of the pleadings, and hence we ested to counsel that they file certified copies of any orders or proceedings in the common pleas court, where the receiver was appointed, and stipu- that this court might consider such orders or proceedings in determining uestion on its merits. This suggestion has been acted upon, and certified s of all pertinent pleadings and orders have been filed." And we have ise considered the orders and proceedings in the Common Pleas Court, like effect as if they had been offered in evidence in the District Court.

1. The bonds in question were part of an issue of eight per cent bonds of the Furnace Company, secured by a mortgage upon certain real and personal property. In 1922 Leach & Co. purchased from the Furnace Company a large number of these bonds, at

for which it paid partly in shares of the seven per preferred stock of the Furnace Company, at 85 and accrued dividends, and partly in cash.

Common Pleas Court against the Furnace Company for foreclosure. The verified petition alleged that the Furnace Company had defaulted in semi-annual interest on the bonds, and all the outstanding bonds had been declared due and payable. It prayed that judgment be given for the amount of the bonds and interest, that the mortgaged property be sold and the proceeds applied to the payment of the outstanding bonds, that a receiver be appointed to take charge of the "property of the defendant" and manage the same and collect the rents and incomes therefrom, and that he be ordered to set apart and sequester all amounts so received from any of the mortgaged property for the payment of the bonds; and for general relief.

On the same day a preferred stockholder of the Furnace Company, brought suit in the Common Pleas Court against the Furnace Company and the mortgage trustee. The verified petition alleged that the Furnace Company, owing to prevailing market conditions and want of capital, had been compelled to close down its plant and cease operations, had been unable to pay the semi-annual interest on its bonds, was indebted in the sum of $1,500,000 on the bonds, had no funds with which to pay the same and accruing interest, was indebted on past due notes and other current obligations in a sum exceeding $2,000,000 which it could not pay, was unable to finance its obligations, and would be subjected to suits, judgments, and executions and the sale of its property and assets, and that for the protection of bondholders, stockholders and creditors of the Company it was necessary that a receiver be appointed to take charge of and conserve its plant and property until its financial requirements could be provided; and prayed that the court appoint a receiver to take charge of its property and assets, and for general relief.

These causes came on to be heard on the petitions for the appointment of a receiver, whereupon the court consolidated them in so far as the question of the appointment, acts and duties of a receiver were common to both. And, finding that there was urgent exigency for the immediate appointment of a receiver in the two cases to preserve the property and assets of the Furnace Company, the Court granted the prayers of the petitions, appointed Grant receiver in both cases, and directed and empowered him to take possession of all the property designated in the trustees' petition, together with all other property, both real and personal, of the Furnace Company, including its books and papers, to do all things necessary in order properly to preserve and protect the assets and property for the best interests of all parties interested therein, and to manage and control the same and collect the rents and income therefrom.

Thereafter Grant applied to the Court for an order granting him as Receiver authority to bring suit in the Federal District Court against Leach & Co., on the ground that it, under an *ultra vires* and illegal contract, had received bonds of the Furnace Company in exchange for preferred stock; and represented to the court that he should recover for the benefit of the stockholders and creditors of the Furnace Company the value of such bonds, or the bonds themselves, and that it would be to the material benefit of the stockholders and creditors if leave to commence such suit were granted. Upon hearing this application, the Court, finding that it was for the best interests of the creditors and stockholders of the Furnace Company that such suit be commenced, authorized and directed the Receiver to commence the suit against Leach & Co., praying for such relief as should be obtained against it, in order to reimburse the Receiver for the apparent unlawful and illegal issue of the bonds by the Furnace Company to Leach & Co. in consideration of the preferred stock.

In his petition in the District Court Grant alleged that he was the receiver of all the assets, choses in action and other property of the Furnace Company, duly appointed by the Common Pleas Court, and brought the suit by virtue of authority so to do granted to him by that court; and that the Furnace Company was without authority to exchange its bonds for its stock. He prayed that the court order Leach & Co. to surrender and deliver to him the bonds that it had received from the Furnace Company

in exchange for the stock, or, if it had disposed of the bonds and could not redeliver them, to pay him their value upon the surrender of the stock; and for general relief. Leach & Co., answering the petition on the merits, admitted that the petitioner was duly appointed receiver of all the assets, choses in action and property of the Furnace Company by the Common Pleas Court, but stated that it had no knowledge or information as to the authority granted to him by that court to bring the action, and therefore neither admitted nor denied that allegation but required the plaintiff to make strict proof thereof. This, we think, under the 30th Equity Rule,[3] put in issue the allegation that the action was brought under authority granted by the Common Pleas Court.

At the hearing, the District Court, after stating that the plaintiff was the Receiver of the Furnace Company, duly appointed by the Common Pleas Court, and as such possessing all the powers conferred by statute and general principles of equity on a receiver —without referring to the question whether he had been authorized to bring the action[4]—found, upon the evidence, that the transaction by which the bonds were delivered to Leach & Co. violated numerous principles of corporation law, justice and honesty, was a gross fraud upon other preferred stockholders, and could not be sustained against creditors; and, as it appeared that Leach & Co. had disposed of the bonds to innocent purchasers, gave decree against it in favor of the Receiver for their value, with the interest on them that had been paid to Leach & Co.

On appeal by Leach & Co., the Circuit Court of Appeals held, in substance, that the powers of the Receiver were limited to the purposes of the suit in which he was appointed, and the Common Pleas Court could confer upon him authority to do only such acts as were within the scope of its jurisdiction as limited by such purposes; and that since there was no object or purpose in them that

[3]This Rule provides that: "The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill . . . specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. Averments other than of value or amount of damage, if not denied, shall be deemed confessed, except as against an infant, lunatic, or other person *non compos* and not under guardianship . . ."

[4]No evidence had been offered upon this issue in the District Court; but the absence was fully supplied, by concurrence of both parties, in the Circuit Court of Appeals. See Note 2, *supra*.

could be served by the bringing of the suit against Leach & Co., the Court was without authority to direct him to bring it, and the purported authorization so to do was beyond its power. And, without passing upon the merits of the receiver's claim, the decree of the District Court was reversed and the suit dismissed.

2. Upon these facts we conclude that the Circuit Court of Appeals was in error in reversing the decree of the District Court and dismissing the Receiver's action, without consideration of his claim upon the merits. While the argument in this Court has covered a wide range, we do not find it necessary to state more than the controlling reasons which lead us to that conclusion.

The Common Pleas Court by its order had in fact authorized and directed Grant, as receiver, to bring the action in the District Court. The Common Pleas Court had previously appointed him receiver of all the property of the Furnace Company, both real and personal, and had directed and empowered him to take possession thereof and to do all things necessary to preserve and protect it for the best interests of all parties interested therein. The claim against Leach & Co. arising out of the exchange of bonds for preferred stock, was a chose in action of the Furnace Company, and as such was a part of the property of which he had been appointed receiver.

The Common Pleas Court had jurisdiction of the petitions for the appointment of a receiver in the suits of the mortgage trustee and preferred stockholder; and the power to determine whether, under the allegations of the petitions, it was authorized to appoint a receiver of the Company's property; to what extent and for what purposes; and what authority should be vested in him as such receiver.

Sec. 11894 of the General Code of Ohio provides that the Common Pleas Court may appoint a receiver in causes pending therein in certain designated cases, and "6. In all other cases in which receivers heretofore have been appointed by the usages of equity."

It is questioned whether under this statute the court rightly appointed, under the petition of the mortgage trustee, a receiver of the portion of the Furnace Company's property which was not covered by the mortgage; and it is asserted that under the petition of the preferred stockholder, in which no other relief was prayed, the appointment was erroneous, under the decisions of the Ohio

courts. But, however this may be, the court had jurisdiction and the power to determine these questions. And even if the order appointing the receiver was erroneous and might have been vacated in part in a direct attack, as upon an appeal by the Furnace Company, its validity was not challenged in any respect by the answer of Leach & Co. in the District Court, which admitted the allegation that Grant had been "duly appointed" receiver of all the Company's property. And plainly the validity of the appointment could not have been questioned by a collateral attack in another court. See *Cadle* v. *Baker*, 20 Wall. 650, 651; *Shields* v. *Coleman*, 157 U. S. 168, 178; *Lively* v. *Picton* (C. C. A.) 218 Fed. 401, 406; *Lydick* v. *Neville* (C. C. A.) 287 Fed. 479, 482; *Olmstead* v. *Distilling Co.*, (C. C.) 73 Fed. 44, 48; *Shinney* v. *North American Co.* (C. C.) 97 Fed. 9, 10; *Barbour* v. *National Bank*, 45 O. S. 133, 140; *McNary* v. *Bush*, 35 Or. 114, 117.

Sec. 11897 further provides that "under the control of the court, the receiver may bring and defend actions in his own name, as receiver, . . . and generally do such acts respecting the property as the court authorizes." Under this provision the Common Pleas Court had jurisdiction to determine what actions the receiver might bring. The action against Leach & Co.,—involving in effect the claim of an illegal taking by it of a large amount of the Company's bonds, which if recovered would reduce the amount of the mortgage lien—came, we think, fairly within the terms of the statute as an act respecting property in the custody of the court in the trustees' suit. But even if this were not the case, the order specifically authorizing and directing the receiver to bring the action in the District Court was one which the Common Pleas Court had jurisdiction to make in the exercise of its discretion and under the construction which it placed upon the statute; and, as such, was not one which, even if erroneous, was subject to the collateral attack which Leach & Co. sought to interpose in the District Court. Thus, in *Sanger* v. *Upton, Assignee*, 91 U. S. 56, 58, the District Court, on the application of the assignee of a bankrupt corporation had made an *ex parte* order that the balance unpaid on the stock of the several stockholders should be paid to the assignee by a certain day, and in default of such payment the assignee should proceed to collect the amount due from each delinquent stockholder. This

Court, in a suit instituted by the assignee in the Circuit Court against a stockholder who had failed to pay pursuant to that order, said: "The order was conclusive as to the right of the assignee to bring the suit. Jurisdiction was given to the District Court by the Bankrupt Act . . . to make it. It was not necessary that the stockholders should be before the court when it was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and, for the same reasons, she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose."

3. It is urged, however, in argument that, even if the order of the Common Pleas Court be otherwise valid, Grant is merely a chancery receiver having no title to the property, and therefore cannot maintain an action for its recovery by reason of the settled doctrine in federal jurisprudence that such a receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated, and that his functions and authority are confined to the jurisdiction in which he was appointed. See *Sterrett* v. *Second National Bank*, 248 U. S. 73, 76; and cases cited. The underlying reason for this rule, as shown in *Booth* v. *Clark*, 17 How. 322, 338, and emphasized in *Hale* v. *Allinson*, 188 U. S. 56, 68, is that such a receiver "has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction." It has been applied by this Court in cases where a chancery receiver appointed by a State court sought to maintain a suit in a Federal court in another State; its effect there being as appears from a statement in *Hale* v. *Allinson, supra*, at p. 68, merely to deny permission to such an action by a receiver, "outside the jurisdiction of the State of his appointment."

Here, however, the Ohio court authorized and directed the Receiver to bring the action in a Federal District Court within Ohio, and having jurisdiction in territory within which the Common Pleas Court itself was located.[5] The Receiver's petition

[5]See note 1, *supra*.

merely prayed for a recovery against Leach & Co., and did not seek an administration of the property by the District Court. Upon such recovery no assets would have to be removed from the territorial jurisdiction of the District Court to Ohio, the State of the receiver's appointment, as they would be recovered and held therein. The order did not authorize or require the receiver to take any extra-territorial action outside of Ohio, either for the purpose of bringing the suit or taking possession of the property recovered; and the bringing of the action within Ohio involved no application to the District Court to be granted the privilege of bringing a suit outside of Ohio upon the principle of comity. We think that under these circumstances the Federal court in the same State cannot rightly be considered a court of foreign jurisdiction within the meaning of the general rule, and that there is no substantial ground for extending that rule, as hitherto applied, so as to bring this case within its terms.

This conclusion is emphasized by the fact that in *Shields* v. *Coleman, supra*, p. 174, a receiver appointed by a chancery court of a Tennessee county, was allowed, without question, pursuant to its order, to maintain an action in the United States Circuit Court for the Eastern District of Tennessee,—within whose territorial limits that county was included—for the restoration of property then in the custody of a receiver appointed by the Federal court. Similar action was taken by this Court in *Harkin* v. *Brundage*, 276 U. S. 36, 42, in a proceeding by receivers appointed by the Superior Court of Cook County, Illinois, brought in the Federal District Court for the Northern District of Illinois. And, conversely, it was held in *Shull* v. *Fidelity & Guaranty Co.*, 81 W. Va. 184, 188, that a receiver appointed by a Federal District Court in West Virginia, might maintain an action in a Circuit Court of the same State, under authority from the Federal court, not being under such circumstances "a foreign receiver" nor proceeding outside of the jurisdiction of his appointment.

4. As the view of the Circuit Court of Appeals that the Receiver was without authority to bring the action against Leach & Co. was erroneous, its judgment must be reversed. And since it did not determine the merits of the Receiver's claim, the case will be remanded to that court with instructions to proceed to that end in conformity with this opinion. See *Buzynski* v. *Luckenbach S. S. Co.*, 277 U. S. 226, 228, and cases cited.

Reversed and remanded.